No. 88-6075-CSY
Status: GRANTED

Title: Darryl James, Petitioner
v.
Illinois

Docketed:
December 2, 1988

Court: Supreme Court of Illinois

Counsel for petitioner: Carlson,Martin S.

Counsel for respondent: Madsen,Terence M.

Entry	Date	Note	Proceedings and Orders
1	Dec 2 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jan 5 1989		Brief of respondent Illinois in opposition filed.
4	Jan 12 1989		DISTRIBUTED. February 17, 1989
6	Feb 21 1989		Petition GRANTED.
			**********
8	Mar 31 1989		Order extending time to file brief of petitioner on the merits until April 28, 1989.
9	Apr 20 1989		Joint appendix filed.
10	May 2 1989		Brief of petitioner Darryl James filed.
11	May 5 1989		Record filed.
		*	3 vol. record-Illinois Supreme Court
13	May 30 1989		Order extending time to file brief of respondent on the merits until June 24, 1989.
14	Jun 23 1989		Brief amicus curiae of United States filed.
15	Jun 23 1989		Brief of respondent Illinois filed.
16	Jul 13 1989		CIRCULATED.
17	Jul 20 1989		SET FOR ARGUMENT TUESDAY, OCTOBER 3, 1989. (4TH CASE)
18	Jul 31 1989	G	Motion of petitioner for leave to file a reply brief, out-of-time, filed.
19	Aug 16 1989		DISTRIBUTED. SL17P4. (Motion of petitioner to file reply brief out-of-time).
20	Oct 2 1989		Motion of petitioner for leave to file a reply brief, out-of-time, GRANTED.
21	Oct 2 1989	X	Reply brief of petitioner Darryl James filed.
22	Oct 3 1989		ARGUED.

(2)

NO. 88-6075

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DARRYL JAMES,

Petitioner

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

Supreme Court, U.S.
FILED
DEC 02 1988
JOSEPH F. SPANIOL, JR.
CLERK

MICHAEL J. PELLETIER
Deputy Defender

*MARTIN S. CARLSON
Assistant Appellate Defender
Office of the State Appellate Defender
State of Illinois Center
100 West Randolph St., Suite 5-500
Chicago, Illinois 60601
(312) 917-5472

COUNSEL FOR PETITIONER

* COUNSEL OF RECORD

39 pp

QUESTION PRESENTED FOR REVIEW

May statements of a defendant which are the fruit of an unlawful arrest be used to rebut the testimony of a defense witness other than the defendant?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Authorities	1
Opinions Below	2
Jurisdiction	3
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	10
THE RULE ANNOUNCED IN THIS CASE, THAT STATEMENTS AS THE FRUIT OF AN UNLAWFUL ARREST MAY BE USED TO REBUT THE TESTIMONY OF A WITNESS OTHER THAN THE DEFENDANT, CREATES AN EXCEPTION TO THE EXCLUSIONARY RULE NOT SUPPORTED BY THE DECISIONS OF THIS COURT, AND CONFLICTS WITH DECISIONS OF OTHER STATE COURTS AND A FEDERAL COURT OF APPEALS.	
Conclusion	14

Appendix A: Opinion of the Supreme Court of Illinois, reported at 123 Ill.2d 523, 528 N.E.2d 723 (1988)

Appendix B: Order of the Supreme Court of Illinois denying rehearing, dated October 3, 1988

Appendix C: Opinion of the Illinois Appellate Court, reported at 153 Ill.App.3d 131, 505 N.E.2d 1118 (1st Dist. 1987)

TABLE OF AUTHORITIES

	Page
Harris v. New York, 401 U.S. 222 (1971)	7, 10, 11
Miranda v. Arizona, 384 U.S. 436 (1966)	10
Oregon v. Hass, 420 U.S. 714, 721-722 (1975)	7, 10, 11
State v. Hubbard, 103 Wash. 2d 570, 693 P.2d 718 (1985)	11, 12
State v. Burnett, 637 S.W.2d 680 (Mo. 1982)	11, 12
Walder v. United States, 347 U.S. 62 (1954)	7, 10, 11
United States v. Havens, 446 U.S. 620 (1980)	7, 10, 11
United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982)	11, 12

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DARRYL JAMES,

Petitioner

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

The petitioner Darryl James respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois affirming his convictions for murder and attempted murder.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois, with three justices dissenting, is reported at 123 Ill.2d 523, 528 N.E.2d 723 (1988), and is attached to this petition as Appendix A. Petitioner unsuccessfully sought rehearing from the Illinois Supreme Court, and a copy of the order denying rehearing is attached as Appendix B.

The opinion of the Appellate Court of Illinois, which had reversed the petitioner's convictions and ordered a new trial, is reported at 153 Ill.App.3d 131, 505 N.E.2d 1118 (1st Dist. 1987). A copy of this opinion is attached as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered in an opinion filed on July 20, 1988, and petitioner's request for rehearing was denied on October 3, 1988.

The jurisdiction of this Court to review the judgment of the Supreme Court of Illinois is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDME T IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly descrfbing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Following a jury trial, petitioner Darryl James was found guilty of the murder of Geliria Boyd and the attempted murder of Delbert Collins and was sentenced to concurrent terms of 30 and 15 years. These charges arose from a shooting which occurred at approximately 11:00 p.m. on August 30, 1982. At that time a group of eight or nine teenagers, which included Boyd and Collins, was walking home from a party on the south side of Chicago. They were approached by three other teenagers, and the shortest of the three asked if anyone had any money. When Delbert Collins made a smart remark in reply, the short boy

pulled a gun and fired several shots at Collins' group. Collins sustained a gunshot wound in the back, and Geliria Boyd was shot in the head and died as a result of this wound.

On the night of August 31, 1982, two Chicago police officers took the petitioner into custody after finding him at his mother's beauty parlor sitting under a hair dryer. They questioned the petitioner while in their squad car and again at the police station, and he made statements concerning the color and style of his hair on the date of the shooting. (R. 9-10, 19-22; Supp.R. 93-95) The petitioner was 15 years old at the time of his arrest but a juvenile court judge granted the State's motion to prosecute him as an adult. Prior to trial petitioner moved to suppress all statements and any other evidence obtained after he was taken into custody on the ground that his warrantless arrest was effected without probable cause. (R. 609-611) Following a hearing the trial court sustained this motion, finding that the police did not have probable cause to arrest the petitioner. (R. 47-60)

At petitioner's trial the State called Delbert Collins and four other members of the group present at the shooting. All five witnesses were friends and called themselves the "B Boys", and all five identified petitioner in court as the boy who fired the shots. Each witness testified that petitioner had long reddish hair worn in a slicked back "butter style" on the night of the shooting, and four of them testified he was wearing an earring. The same four witnesses also testified that they had seen the petitioner a few weeks earlier at the Bud Billikin Parade and remembered him because of his red "butter" hair style and earring. (R. 296-302; 341-343, 352; 388, 391-392; 411-412; 430-431, 433) At trial petitioner's hair was black and was worn in a natural style. When they gave descriptions of the offenders to the police immediately after the shooting none of the witnesses said anything about the hair color or style of the person who fired the shots (R. 329, 365, 399, 448) but two of them testified that they did mention the red hair when they spoke to detectives later on at the police station. (R. 364, 402-403)

The final witness called by the State during its case-in-chief was Detective Steven Glynn, one of the officer's who arrested the petitioner. He testified that on the night of August 31, 1982, during his investigation of the shooting, he and his partner went to a beauty parlor called Diane's House of Beauty. While there he spoke to Diane James, petitioner's mother, and saw the petitioner under a hair dryer in the beauty parlor. (R. 486-489)

The petitioner did not testify at trial but called two witnesses in his defense. The first of these witnesses was Jewel Henderson, who was a friend of the petitioner and his family. (R. 501-502) She testified that on the day of the shooting she took the petitioner to a high school to register him, and at that time his hair was black and he was not wearing an earring. (R. 502-504) She also testified that earlier that month she watched the Bud Bullikin Parade with the petitioner from a window of his mother's beauty shop. (R. 504-505) Finally, Ms. Henderson testified that petitioner had a reputation in the neighborhood of being a non-violent person. (R. 507)

Thereafter, the State sought to introduce the petitioner's suppressed statements to rebut Jewel Henderson's testimony that the petitioner's hair was black on the day of the shooting. When the trial court ruled, over petitioner's Fourth Amendment objection, that the State could do so, defense counsel requested a hearing on the voluntariness of the statements. (Supp.R. 62-65) After a hearing held outside the presence of the jury, the trial court found that the petitioner's statements were given voluntarily, (Supp.R. 128) and overruled defense counsel's renewed Fourth Amendment objection to the use of the statements. (Supp.R. 128-134) Defense counsel then requested that the jury be instructed that the petitioner's statements could be considered only insofar as they reflect on the believability of Miss Henderson, and the judge said he would do so. (Supp.R. 134)

In rebuttal, Detective Glynn was recalled by the State and testified that he arrested the petitioner on August 31, 1982, and spoke to him in a squad car. At that time petitioner stated that on the evening of August 30 his hair was reddish brown, was long,

and was combed straight back. (Supp.R. 135-136) Later that night Glynn spoke to the petitioner in an interview room at the police station. Over objection, Glynn testified that he again asked petitioner about the color of his hair and the reason he was at the beauty parlor, and the petitioner said that his hair was reddish brown on the evening of the shooting, was long and combed straight back, and that he had gone to the beauty parlor to have his hair dyed black and curled in order to change his appearance. (Supp.R. 134-137)

Following Detective Glynn's testimony, when defense counsel requested the judge to instruct the jury on the purpose for which this testimony was received, the court orally instructed the jury as follows:

> It's offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red. (Supp.R. 144-145)

In surrebuttal, petitioner's aunt testified that she saw him on August 30 and August 31, 1982, that on both days his hair was black, and that she had never seen him with red hair. (Supp.R. 149-150) The petitioner's brother also testified that petitioner's hair was black on the day he was arrested, on the day before he was arrested, and on the day of the Bud Billikin Parade. (Supp.R. 153-154)

Prior to closing arguments, defense counsel submitted two alternative written instructions stating:

> Evidence that the defendant made statements following his arrest may be considered by you only as it may affect the believability of Jewel Henderson [of witnesses]. It may not be considered by you as evidence of the commission of any of the crimes charged. (Supp.R. 161, 162)

The trial court refused both instructions, (Supp.R. 159, 206-207) and instead gave a pattern jury instruction concerning the limited purpose for which a witness' own prior inconsistent statements could be considered. Illinois Pattern Jury Instruction, Criminal, No. 3.11 (2nd ed. 1981)(Supp.R. 229)

During the State's rebuttal closing argument, the prosecutor commented on the petitioner's suppressed statements as follows:

> PROSECUTOR: Now, as I said, everybody in this room has a conscience, even Darryl has a conscience; and Darryl's conscience got to him the night he told the police that he changed his hair color. That's why --
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled. He may argue.
>
> PROSECUTOR: He did something terrible and had to do something about it. His conscience overcame him.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.
>
> PROSECUTOR: ...That's what happened when he told the police that he changed his hair color. (Supp.R. 216-217)
>
> * * * *
>
> PROSECUTOR; This case comes to you with five eyewitnesses, an admission that he changed his color -- changed the color of his hair.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled. (Supp.R. 219)

On appeal the Illinois Appellate Court reversed petitioner's convictions and ordered a new trial, holding that the admission of petitioner's tainted statements to rebut the testimony of Jewel Henderson violated his Fourth Amendment rights. (Appendix C) The Appellate Court observed that the decisions of this Court permitting the use of illegally obtained evidence at trial were strictly limited to the impeachment of a defendant's testimony, Walder v. United States, 347 U.S. 62 (1954), Harris v. New York, 401 U.S. 222 (1971), Oregon v. Hass, 420 U.S. 714 (1975), United States v. Havens, 446 U.S. 620 (1980), and ruled that it would not create a further exception to the exclusionary rule allowing use of tainted evidence to rebut the testimony of a defense witness, concluding that to do so "would provide little or no deterrence against further Fourth Amendment violations". (Appendix C, p. 4)

The Appellate Court also rejected the State's alternative argument that the error in admitting the petitioner's suppressed statements was harmless. In doing so the court noted that the trial court's oral instruction that this evidence was offered to

refute and rebut Jewel Henderson's testimony in effect sanctioned the substantive use of this evidence; that defense counsel's request for a further limiting instruction was refused; and that the State was allowed to make substantive use of the suppressed statements during closing argument. (Appendix C, p. 4)

The Illinois Supreme Court, by a 4-to-3 vote, reversed the judgment of the appellate court, holding that the petitioner's tainted statements were properly admitted to impeach the testimony of the defense witness. (Appendix A). The court acknowledged that because the petitioner did not testify, the exception to the exclusionary rule it announced went beyond that sanctioned in Walder, Harris, Hass and Havens, but concluded that it was not inconsistent with those cases and would not seriously erode the protection of the exclusionary rule. (Appendix A, p. 6-7)

The court also rejected petitioner's contentions that the jury was not properly instructed on the limited purpose for which his statements could be considered and that the prosecution used these statements as substantive evidence during its closing argument. The court held that the refusal of the limiting instruction tendered by defense counsel did not constitute reversible error because the jury was given the pattern instruction on the use of a witness' prior inconsistent statements. While acknowledging that this instruction did not "fit the situation in this case", the court concluded that when considered with the trial court's oral instruction, the jury was informed of the limited purpose for which it could consider this evidence, and that any error or irregularity in the oral instruction was waived by petitioner's failure to object or request further instruction. (Appendix A, p. 8-9)

With respect to the State's closing argument, the court discussed only the prosecutor's assertion that: "This case comes to you with five eyewitnesses, an admission that he changed the color - changed the color of his hair." (Supp.R. 219; Appendix A, p. 9) Despite the absence of any reference by the prosecutor to Jewel Henderson's testimony, the court concluded that this comment was relevant to the issue of her truthfulness and was not "wholly unwarranted", and that because it was only a passing

reference any error resulting from this remark was harmless. (Appendix A, p. 9) The court did not mention the other, more lengthy comment cited as error by petitioner in which the prosecutor argued that the reason petitioner told the police that he changed his hair color was that he did something terrible and his conscience overcame him. (Supp.R. 216-217) The court's failure to address this use of the suppressed statements as substantive evidence of guilt was one of the points raised in petitioner's request for rehearing which was denied.

REASONS FOR GRANTING THE WRIT

THE RULE ANNOUNCED IN THIS CASE, THAT STATEMENTS SUPPRESSED AS THE FRUIT OF AN UNLAWFUL ARREST MAY BE USED TO REBUT THE TESTIMONY OF A WITNESS OTHER THAN THE DEFENDANT, CREATES AN EXCEPTION TO THE EXCLUSIONARY RULE NOT SUPPORTED BY THE DECISIONS OF THIS COURT, AND CONFLICTS WITH DECISIONS OF OTHER STATE COURTS AND A FEDERAL COURT OF APPEALS.

Despite the fact that the petitioner did not testify at his trial, the State was allowed to introduce statements elicited from him by police officers shortly after he was taken into custody without probable cause. The trial court ruled that these unlawfully obtained statements were admissible to impeach the conflicting testimony given by defense witness Jewel Henderson concerning the color of petitioner's hair on the day of the crime, and this ruling was affirmed by the Illinois Supreme Court with three justices dissenting.

In announcing the rule that illegally obtained evidence may be used to impeach a witness other than the defendant, the majority opinion relied upon the line of cases beginning with Walder v. United States, in which this Court held that the Fourth and Fifth Amendment exclusionary rules did not bar the use of illegally seized evidence, or statements obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), to impeach the credibility of a defendant whose testimony at trial conflicts with the illegally obtained evidence. Walder v. United States, 347 U.S. 62 (1954); Harris v. New York, 401 U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975); United States v. Havens, 446 U.S. 620 (1980). The majority concluded that the result in these cases did not turn upon the fact that it was the defendant's testimony that was being impeached, and that the admission of the tainted evidence in the circumstances of the petitioner's trial was not inconsistent with the reasoning of these cases. (Appendix A, p. 6-7) Review should be granted because, as demonstrated in the dissenting opinions, the impeachment exception approved in this case differs from that sanctioned by this Court's decisions in

ways that are fundamental to the ends of the exclusionary rule. Moreover, the exception to the exclusionary rule approved in this case has been rejected by the Court of Appeals for the District of Columbia Circuit, United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982), and by the supreme courts of Washington and Missouri. State v. Hubbard, 103 Wash. 2d 570, 693 P.2d 718 (1985); State v. Burnett, 637 S.W.2d 680 (Mo. 1982).

A fundamental infirmity in the rule adopted in this case is that the type of impeachment involved is the contradiction of a witness' testimony by extrinsic evidence, the extrinsic evidence being the petitioner's suppressed statements. Unlike the situation in Harris and Hass where the defendant was confronted with his own prior inconsistent statements, Jewel Henderson's testimony concerning the petitioner's hair color would be impeached only if the jury found that the petitioner's contrary statements were true. In short, to be relevant for impeachment in this context the petitioner's suppressed statements had to be used substantively, a purpose for which they were clearly inadmissible. United States v. Havens, 446 U.S. 620, 627-628.

The rule announced herein also raises more substantial concerns over the effect it may have on the deterrent function of the exclusionary rule than existed in the cases upon which the majority opinion relies. This Court's conclusion in these cases that there was only a "speculative possibility" of encouraging police misconduct was reached only in the context of allowing the use of tainted evidence to impeach the credibility of a defendant's testimony on direct or reasonably competent cross-examination. Harris v. United States, 401 U.S. 222, 225; Oregon v. Hass, 420 U.S. 714, 721-722; United State v. Havens, 446 U.S. 620, 626-628. While the majority opinion characterizes its expansion of the impeachment exception as defining a very narrow area of operation, (Appendix A, p. 7) the fact remains that under this rule the potential exists for the State to use illegally obtained evidence to impeach the testimony of any witness a defendant might call. Given the breadth of the exception the concern expressed in Justice Clark's dissent that the majority's decision will lead to some increase in police misconduct

(Appendix A, p. 14-15) cannot be dismissed as a mere speculative possibility.

Three other courts which have addressed the question of the use of illegally obtained evidence to impeach or rebut defense witnesses have disagreed with the decision in this case. In United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982), the government, on appeal of an order suppressing statements and physical evidence on Fifth and Fourth Amendment grounds, sought a ruling that it be permitted to use the illegally obtained evidence for the limited purpose of rebutting the insanity defense on which the defendant was expected to rely. One of the arguments the government advanced was a "testimony-by-proxy" theory. In rejecting this theory, the court stated:

> In our view this theory cuts too wide a swath. Although it is indeed true that if a defendant takes the stand and testifies in the manner contradicted by illegally obtained evidence, that evidence can be used for the limited purpose of impeachment, there is as yet no basis in law for converting this limited exception into a general license to use illegally obtained evidence for rebuttal purposes. And if there were, the government does not adequately explain why it would single out the insanity defense for application of the testimony-by-proxy theory. All defense testimony is in a sense testimony by proxy, yet the government concedes that it would not seek to apply its rebuttal theory to an alibi or other affirmative defense. We can find no reason for such a distinction. 672 F.2d at 134 (footnotes omitted)

In State v. Hubbard, 103 Wash. 2d 570, 693 P.2d 718 (1985), after a review of this Court's decisions in Harris, Hass and Havens, and the Hinckley decision, the Supreme Court of Washington sitting en banc held by a 6-to-3 vote that statements obtained from the defendant in violation of Miranda in which he admitted his presence at the scene of a murder could not be used to rebut the alibi testimony of his girlfriend.

In State v. Burnett, 637 S.W.2d 680 (Mo. 1982) the Supreme Court of Missouri, also sitting en banc, held that under this Court's decision in United States v. Havens, physical evidence seized in violation of the defendant's Fourth Amendment rights was erroneously admitted in rebuttal to impeach the testimony of a defense witness.

Because this case involves an important question concerning the scope of the exclusionary rule that has not been addressed by this Court, and because the decision of the Illinois Supreme Court conflicts with the decisions of the state and federal courts cited above, review by this Court is warranted.

CONCLUSION

For the above reasons, petitioner Darryl James prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

MICHAEL J. PELLETIER
Deputy Defender

MARTIN S. CARLSON
Assistant Appellate Defender
Office of the State Appellate Defender
State of Illinois Center
100 West Randolph St., Suite 5-500
Chicago, Illinois 60601
(312) 917-5472

COUNSEL FOR PETITIONER

APPENDIX A

123 Ill.2d 523

The PEOPLE of the State of Illinois, Appellant,

v.

Darryl JAMES, Appellee.

No. 65049.

Supreme Court of Illinois.

July 20, 1988.

Rehearing Denied Oct. 3, 1988.

Defendant was convicted in the Circuit Court, Cook County, R. Eugene Pincham, J., of murder and attempted murder, and he appealed. The Appellate Court, McNamara, P.J., 158 Ill.App.3d 131, 106 Ill.Dec. 327, 505 N.E.2d 1118, reversed and remanded, and State petitioned for leave to appeal. The Supreme Court, Ryan, J., held that murder defendant's suppressed statements were admissible to rebut assertion by defense witness elicited on direct examination which was directly contrary to defendant's suppressed statement, though defendant did not testify, where it was apparent that witness' statement was purposely presented by defendant and suppressed statement did not amount to confession.

Appellate court reversed; Circuit Court affirmed.

Ward, J., dissented and filed opinion in which Stamos, J., joined.

Clark, J., dissented and filed opinion in which Stamos, J., joined.

1. Witnesses ⇐406

Murder defendant's suppressed statements were admissible to rebut assertion by defense witness elicited on direct examination which was directly contrary to defendant's suppressed statement, though defendant did not testify, where it was apparent that witness' statement was purposely presented by defendant and suppressed statement did not amount to confession.

2. Criminal Law ⇐1173.2(9)

Any error in failing to give proper limiting instruction at end of trial in which murder defendant's supressed statement had been admitted to impeach contrary defense witness' testimony was harmless where court informed jury that evidence was to be considered for impeachment purposes only at time it was admitted and defendant failed to object or request further instruction at that time, and court gave pattern instruction on inconsistent statements at end of trial.

3. Criminal Law ⇐728

Prosecutor's rebuttal argument, that defendant had admitted altering his appearance between time of crime and trial, did not constitute improper substantive use of defendant's suppressed statement, which had been admitted to rebut contrary defense testimony; reference was relevant to issue of defense witness' truthfulness, which had been asserted by defense counsel in closing.

Steven Clark, Deputy Defender, Karen Michels, Asst. Appellate Defender, Office of the State Appellate Defender, Chicago, for appellee.

Neil F. Hartigan, Atty. Gen., Terence M. Madsen, Asst. Atty. Gen., Chicago, for appellant; Richard M. Daley, State's Atty., Chicago, Thomas V. Gainer, Jr., Sharon Johnson Coleman, Asst. State's Attys., of counsel.

Justice RYAN delivered the opinion of the court:

The defendant, Darryl James, was convicted by a jury in the circuit court of Cook County of the murder of Gerlin Boyd and the attempted murder of Delbert Collins. The court sentenced the defendant to concurrent terms of 30 years for murder and 15 years for attempted murder. The appellate court reversed the convictions (158 Ill. App.3d 131, 106 Ill.Dec. 327, 505 N.E.2d 1118), and we granted the State's petition for leave to appeal (107 Ill.2d R. 315).

The issues presented in this appeal all relate to the State's use of evidence, obtained in violation of the defendant's fourth amendment rights, to rebut the testimony

of a defense witness other than the defendant.

The record in this case reveals that on August 30, 1962, at approximately 11 p.m., a group of eight boys was proceeding home from a party at the Ida B. Wells housing project in Chicago. Three other boys approached the group and demanded money. When no money was surrendered, one member of the trio produced a gun and began shooting at the larger group. Gerlin Boyd was wounded and died as a result of the shooting. Delbert Collins, who was shot in the back, testified on behalf of the State at the defendant's trial.

Upon arriving at the scene of the shooting, the police questioned several eyewitnesses who volunteered information regarding the incident. Five of the eyewitnesses, including Delbert Collins, were members of a group called the "B Boys." The five State witnesses described two of the offenders as being 6 feet 1 inch tall and the third offender as being about 5 feet 4 inches tall. They told the police that all three were wearing ski jackets and baseball caps. The shortest of the three offenders fired the gun. One of the eyewitnesses gave the police the name of a person he thought was one of the offenders. Police arrested this suspect and questioned him, but later released him when the same witness said this person was not involved in the shooting. The record reveals that the arrested suspect told the police that two youths by the names of "Carey" and "Guam" were involved in the incident and that "Carey" was the shooter. "Carey" was also brought into the station, but was subsequently released when the eyewitness told police that "Carey" was also not one of the offenders.

The "B Boys" testified for the State at trial and all made in-court identifications of the defendant, who was taken into police custody on August 31, the day after the shooting. The police had found the defendant at his mother's beauty shop sitting under the hair dryer.

Each of the "B Boys" testified that the person responsible for the shooting had "reddish" hair, which he wore shoulder length in a slicked-back "butter" style, and also wore an earring. When giving descriptions of the offenders to the police immediately following the incident, none of the eyewitnesses said anything about the hair color or hairstyle of the person who shot the victim. One witness did testify that he told a detective at the police station that the person responsible for the shooting had red hair and a light "reddish" complexion. Each of the witnesses recalled having seen the defendant a few weeks prior to the shooting at the Bud Billiken Parade. They remembered the defendant because of his red "butter" hairstyle and the earring in his left ear. At trial, the defendant's hair was black and he was wearing it in a "natural" style. He was not wearing an earring. Despite the discrepancy between the description given by the eyewitnesses immediately after the incident occurred and the defendant's physical appearance at trial, the "B Boys" stood firm in their identification of the defendant as the one who committed the shooting.

The defendant's principal witness at trial was Jewel Henderson, a friend of the defendant's family. She testified that on the day of the shooting she had taken the defendant to register for high school, and at that time the defendant's hair was black. To "impeach" and rebut Henderson's testimony, the State sought to introduce a previously suppressed statement of the defendant. Following a hearing on the voluntariness of the defendant's suppressed statement, the trial court, over the defendant's objection, permitted the State to introduce the statement.

The suppressed statement which the trial court admitted into evidence revealed that while in police custody on August 31, the defendant told the police that on the evening of August 30, his hair was long and combed back straight and "reddish" in color. He said that he had gone to his mother's beauty parlor on August 31 to have his hair dyed and curled to change his appearance. The trial court had suppressed this statement at a pretrial hearing after finding that there was no probable cause to arrest the defendant, and thus, that the

statement was the fruit of an unlawful arrest.

Following the police officer's testimony regarding the defendant's suppressed statement, at the request of defendant, the trial court orally instructed the jury that the testimony was "offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red." The defendant made no objection to this instruction and suggested no change in it or any further instruction. At the close of the evidence, however, the trial court refused the defendant's proffered jury instruction explaining that the defendant's statement could be considered only for purposes of determining the believability of the witness and could not be used as substantive evidence of the defendant's guilt or innocence. These refused instructions and the instructions given relating to this issue will be discussed later.

The record further reveals that during rebuttal closing argument, the prosecutor stated, "[T]his case comes to you with five eyewitnesses, an admission that he changed his color—changed the color of his hair." Defense counsel's objection to this reference to the defendant's suppressed statement was overruled.

Defendant did not testify at trial. As noted previously, the jury found the defendant guilty of murder and attempted murder and the trial court sentenced the defendant on both counts.

Defendant appealed his convictions to the appellate court, arguing that his fourth amendment rights were violated when the trial court admitted the defendant's previously suppressed statement to impeach the testimony of defense witness Henderson. The appellate court reversed the defendant's convictions and ordered a new trial, finding that the admission of the defendant's suppressed statement was improper. The appellate court also rejected the State's alternative argument that even if the trial court did err in admitting the defendant's suppressed statement, the error was harmless in light of the overwhelming evidence of the defendant's guilt. 152 Ill.App.3d 131, 106 Ill.Dec. 327, 505 N.E.2d 1118.

In its appeal before this court, the State maintains that the appellate court's reversal of the defendant's convictions was erroneous. Citing *United States v. Havens* (1980), 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559, *People v. Payne* (1982), 96 Ill.2d 45, 74 Ill.Dec. 542, 456 N.E.2d 44, and *People v. Finley* (1982), 105 Ill.App.3d 230, 61 Ill.Dec. 81, 434 N.E.2d 18, the State contends that the trial court properly admitted the defendant's suppressed statements to impeach and rebut Henderson's testimony. The State again argues, in the alternative, that even if the trial court did err in admitting the defendant's suppressed statements, that error is harmless in light of the overwhelming evidence of the defendant's guilt.

It is, of course, the general rule that evidence obtained in violation of the fourth amendment may not be introduced into evidence at trial. (*Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1061; *Weeks v. United States* (1914), 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652.) However, while the exclusionary rule may have begun as an absolute bar on the use of such evidence (see *Agnello v. United States* (1925), 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145; *Silverthorne Lumber Co. v. United States* (1920), 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319), over the years a number of narrow exceptions to the rule have evolved.

One such exception applicable to the facts of this case has its origin in *Walder v. United States* (1954), 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503. The defendant in *Walder* was charged with four narcotics-related transactions. He had previously been indicted for purchase and possession of heroin, but those charges were dismissed after a motion to suppress illegally obtained evidence was granted. 347 U.S. at 63, 74 S.Ct. at 355, 98 L.Ed. at 506.

The prosecutor's case consisted principally of the testimony of two government informers who had allegedly purchased

drugs from Walder. Walder's defense consisted solely of his own testimony, during which he denied any narcotics dealings with the informers. Early in his direct examination, Walder testified as follows:

"'Q. Now, first, Mr. Walder, before we go further in your testimony, I want to you [*sic*] tell the Court and jury whether, not referring to these informers in this case, but whether you have ever sold any narcotics to anyone.

A. I have never sold any narcotics to anyone in my life.

Q. Have you ever had any narcotics in your possession, other than what may have been given to you by a physician for an ailment?

A. No.

Q. Now, I will ask you one more thing. Have you ever handed or given any narcotics to anyone as a gift or in any other manner without the receipt of any money or any other compensation?

A. I have not.

Q. Have you ever even acted as, say, have you acted as a conduit for the purpose of handling what you knew to be a narcotic from one person to another?

A. No, sir.'"

347 U.S. at 63, 74 S.Ct. at 355, 98 L.Ed. at 506.

On cross-examination, in response to questioning about this direct testimony, Walder reiterated his assertion that he had never purchased, sold or possessed any narcotics. Over objection, the prosecution then questioned him about his previous drug arrest, and about the heroin which had been unlawfully seized. Walder denied that any drugs had been taken from him at that time. Thereafter the prosecution introduced evidence of the prior search and seizure of the heroin. The trial court admitted this evidence, instructing the jury that it was to be used solely for the purpose of impeaching the defendant's credibility.

The Supreme Court upheld the admission of the evidence. In so doing, it acknowledged the general rule that the government may not use the fruits of an illegal search to secure a conviction. However, the Court went on to explain the rationale for the exception it was creating as follows:

"It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." 347 U.S. at 65, 74 S.Ct. at 356, 98 L.Ed. at 507.

This so-called "impeachment exception" to the exclusionary rule was expanded in *Harris v. New York* (1971), 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1. In that case, a prosecution for unlawful sale of heroin, the defendant's post-arrest inculpatory statements had been suppressed because they were obtained in violation of *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. The defendant testified, and on direct examination admitted making a sale of the contents of a glassine bag to an undercover officer, but asserted that the substance was baking power. That testimony contradicted the defendant's post-arrest statements. *Harris*, 401 U.S. at 223, 91 S.Ct. at 644, 28 L.Ed.2d at 3.

On cross-examination, the defendant was asked about those inconsistent statements, and he testified that he could not remember virtually any of the questions or answers recited by the prosecutor. The jury was subsequently instructed that the statements attributed to the defendant by the prosecution could only be considered in assessing the defendant's credibility and not as evidence of guilt.

The Supreme Court, quoting *Walder*, held that this use of the otherwise inadmissible evidence was proper. The Court also expanded the *Walder* rule in a significant respect, stating:

"It is true that Walder was impeached as to collateral matters included in his direct examination, whereas petitioner here was impeached as to testimony bearing more directly on the crimes charged. We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder*. Petitioner's testimony in his own behalf concerning the events of January 7 contrasted sharply with what he told the police shortly after his arrest. The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." (401 U.S. at 225, 91 S.Ct. at 645, 28 L.Ed.2d at 4.)

See also *Oregon v. Hass* (1975), 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570.

These principles were reiterated, and the rule was further expanded in *United States v. Havens* (1980), 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559. In that case, Havens and a companion, John McLeroth, were arrested after airport customs officers found cocaine sewed into makeshift pockets in a T-shirt McLeroth was wearing. A warrantless search of Havens' luggage produced a T-shirt from which pieces had been cut that matched the pockets in McLeroth's T-shirt. The fruits of the search of Havens' luggage, including the cut-up T-shirt, were suppressed prior to trial. 446 U.S. at 621–22, 100 S.Ct. at 1914, 64 L.Ed.2d at 562.

McLeroth pleaded guilty and testified against Havens. His testimony included an assertion that Havens had supplied him with the altered T-shirt and had sewn the pockets shut. Havens took the stand in his own defense and, on direct examination, denied involvement in the offense and also denied knowing that McLeroth had anything "taped or draped around his body." 446 U.S. at 622, 100 S.Ct. at 1914, 64 L.Ed.2d at 563.

On cross-examination, Havens was questioned specifically about his involvement in "sewing of the cotton swatches to make pockets on [the] tee shirt." (446 U.S. at 623, 100 S.Ct. at 1914, 64 L.Ed.2d at 563.) He again denied involvement. He was then asked whether when he came through customs he had the suppressed T-shirt in his luggage. After defense counsel's objection was overruled, Havens denied possession of the T-shirt. Subsequently, on rebuttal, a government agent testified that the T-shirt had been found in Havens' luggage, and the T-shirt was admitted into evidence. The jury was instructed that this rebuttal evidence was to be considered only for impeaching Havens' credibility. 446 U.S. at 623, 100 S.Ct. at 1914, 64 L.Ed.2d at 563.

The Supreme Court upheld this use of the evidence. In so doing, it enlarged the impeachment exception in an important respect. In prior cases such as *Walder* and *Harris*, the statements sought to be impeached were elicited on direct examination. In *Havens*, the specific "T-shirt testimony" which was impeached by admission of the illegally seized evidence was brought out on cross-examination by the government. This fact, while not directly applicable to the case before us, nonetheless indicates the Court's increasing unwillingness to condone the misuse of the exclusionary

rule as a shield for purposeful perjury. The Court stated:

"We also think that the policies of the exclusionary rule no more bar impeachment here than they did in *Walder, Harris*, and *Hass*. In those cases, the ends of the exclusionary rules were thought adequately implemented by denying the government the use of the challenged evidence to make out its case in chief. The incremental furthering of those ends by forbidding impeachment of the defendant who testifies was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial. We reaffirm this assessment of the competing interests, and hold that a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." 446 U.S. at 627–28, 100 S.Ct. at 1916–17, 64 L.Ed.2d at 566.

The principles emerging from this line of cases were recently applied by this court in *People v. Payes* (1983), 96 Ill.2d 45, 74 Ill.Dec. 542, 456 N.E.2d 44. There, the fruits of a search of the defendant's apartment had been suppressed. During cross-examination of one of the arresting officers, the defense counsel asked whether the defendant's apartment had been searched. After the officer responded affirmatively, defense counsel concluded his questioning, thus leaving the jury with the false impression that the search had been fruitless. The trial court permitted the introduction of the suppressed evidence to correct this impression on the ground that the defense's misleading cross-examination opened the door to its admission. 96 Ill.2d at 49–50, 74 Ill.Dec. 542, 456 N.E.2d 44.

This court upheld that ruling, stating, "'[I]f a defendant procures, invites or acquiesces in the admission of evidence, even though it be improper, he cannot complain.'" (96 Ill.2d at 50, 74 Ill.Dec. 542, 456 N.E.2d 44, quoting *People v. Burage* (1961), 23 Ill.2d 280, 283, 178 N.E.2d 369, *cert. denied* (1962), 369 U.S. 808, 82 S.Ct. 651, 7 L.Ed.2d 555.) This court went on to state:

"'There is no gainsaying that arriving at the truth is a fundamental goal of our legal system' (*United States v. Havens* (1980), 446 U.S. 620, 626, 64 L.Ed.2d 559, 565, 100 S.Ct. 1912, 1916), and we consider that allowing the defense or prosecution to misrepresent to the jury the actual facts of the case is neither consistent with the proper functioning and continued integrity of the judicial system nor with the policies of the exclusionary rules. (See *Havens*; *Walder v. United States* (1954), 347 U.S. 62, 98 L.Ed. 503, 74 S.Ct. 354.)" 96 Ill.2d at 51–52, 74 Ill.Dec. 542, 456 N.E.2d 44.

As the above discussion demonstrates, both the Supreme Court precedent and our own prior cases exhibit strong disapproval of those attempts to abuse the exclusionary rule. The laudable purposes of the rule notwithstanding, it does not follow that defendants may transform it into a shield for knowing perjury or intentional misrepresentation.

The defendant argues, however, that *Walder, Harris, Hass* and *Havens* are distinguishable from this case in one decisive respect: in all those cases the defendant himself testified, and it was his own testimony which was impeached by admission of the previously suppressed evidence. According to this view, when a defendant elects to take the stand and testify in a manner inconsistent with suppressed evidence, he thereby "waives" his right to have the impeaching material excluded. Thus, the argument runs, if the defendant does not testify no such "waiver" occurs and the evidence must remain excluded, even if other defense witnesses testify falsely.

We do not accept these contentions. While it is true as a factual matter that the defendants in *Walder, Harris* and *Havens* all testified and were themselves impeached, even a cursory reading of those cases reveals that they do not turn on a "waiver" theory, although the waiver theory has been advanced as one explanation for the developing limitations on the exclusionary rule. (See 4 W. LaFave, Search & Seizure, at 488 (2d ed. 1987).) Rather, the animating principle behind all those cases was a balancing between the goals of the exclusionary rule and the importance of arriving at the truth in criminal trials. In striking that balance, the Court "rejected the notion that the defendant's constitutional shield against having illegally seized evidence used against him could be 'perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.'" *Havens*, 446 U.S. at 626, 100 S.Ct. at 1916, 64 L.Ed.2d at 565, quoting *Harris*, 401 U.S. at 226, 91 S.Ct. at 646, 28 L.Ed.2d at 5.

In our view, if a defendant is prohibited from using perjury by way of a defense, it matters not from whose lips that perjury comes. Just as a defendant may not directly perjure himself and then hide behind the exclusionary rule, he also cannot be allowed to use perjurious testimony through a biased defense witness, in this case the principal defense witness, without affording the prosecution an opportunity to challenge the veracity of that testimony. We therefore conclude that admission of the evidence was not inconsistent with the reasoning of the cases discussed above.

Defendant further argues that expansion of admissibility in this manner would seriously erode the protections of the exclusionary rule. He asserts that such a holding will enable police and prosecutors to willfully disregard constitutional rights when obtaining evidence in the knowledge that such evidence will be admissible to contradict defense witnesses. We do not agree with this contention. If this exception to the exclusionary rule is limited to the use of the suppressed evidence to rebut statements made by a defense witness on direct examination and not to rebut statements elicited on cross-examination, there is little likelihood that the police would plan to disregard constitutional rights to obtain a statement from the defendant on the slight chance that a witness for the defense would commit perjury on direct examination. See 4 W. LaFave, Search & Seizure, at 488 (2d ed. 1987).

The argument that the floodgates will be opened to admission of illegally seized evidence in countless cases assumes that defense witnesses commonly resort to perjury. We point out that this case defines a very narrow area in which the exception to the exclusionary rule may operate. The statement of the witness sought to be rebutted by the suppressed evidence must not be elicited through cross-examination by the prosecutor, but must be an assertion by a defense witness elicited on direct examination which is directly contrary to an assertion made by the defendant in the suppressed statements. The difference between the assertion by the defense witness and that contained in the suppressed statement must be more than a mere inconsistency. The difference must amount to a contradiction to the extent that the statement of the witnesses cannot be true when measured against the suppressed statement of the defendant. Also, it must be apparent that the untrue statement of the witness, as so measured, has been purposely presented by the defendant. Furthermore, any part of a suppressed statement of the defendant which can be characterized as a confession must not be used for the purpose of rebutting the testimony of a defense witness. The holding in *Walder* that the defendant must be free to deny all of the elements of the case against him without thereby giving leave to the government to introduce, by way of rebuttal, illegal evidence secured by it must be scrupulously observed in applying the rule we announce today.

In our view, this rule strikes the proper balance between the right of defendants to be protected against unconstitutional searches and seizures, and the fact-finding goals of criminal trials. The deterrent ends of the exclusionary rule are served by denying the prosecution the use of the evidence in making its case in chief. So long as the defendant and his witnesses testify truthfully and refrain from testifying in a

manner inconsistent with that evidence, the defendant retains the benefits of suppression. However, just as the prosecution may not make its case with suppressed evidence neither can the defendant affirmatively exploit the fact of suppression in fashioning his defense.

[1] To summarize, we hold that when a defense witness testifies on direct examination in a manner squarely at odds with evidence which has been suppressed, that evidence may be introduced to challenge the veracity of the testimony. That said, we emphasize that this rule should be carefully applied to avoid enlargement of the exception to the point of swallowing the exclusionary rule. As previously noted, only statements made on *direct* examination may be impeached and there must be a direct, material relationship between the trial testimony and the impeaching evidence. We recognize that the term "impeach" is loosely used in this context. Although the use of prior inconsistent statements for impeachment is ordinarily considered in connection with prior statements by the witness sought to be impeached, impeachment may also be accomplished by the use of a prior contradictory statement by another. Although such contradictory statements by others are often held inadmissible as being irrelevant as collateral to the main proceeding, such a contradictory statement of another may be used to prove untrue some fact recited by a witness as true which, if he were really there and saw what he claims to have seen, he could not have been mistaken. "So we may recognize this * * * type of allowable contradiction, namely, the contradiction of any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true." McCormick, Evidence § 47, at 99 (2d ed. 1972).

[2] The defendant's next contention is that even if the suppressed statement were properly admitted, error resulted when the trial court refused a limiting instruction proposed by the defendant, and when the prosecution was permitted to argue the evidence "substantively" against the defendant. We hold, however, that any error in this regard was harmless.

After the defendant's suppressed statements were introduced into evidence, defense counsel requested that the jury be given a limiting instruction regarding the use of the statements. The trial judge, at that time, instructed the jury as follows:

> "It's offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red."

Defense counsel did not object to this instruction and did not ask that it be altered in any way.

Subsequently, during the conference on instructions, defense counsel proposed the following instruction:

> "Evidence that the defendant made statements following his arrest may be considered by you only as it may affect the believability of Jewel Henderson. It may not be considered by you as evidence of the commission of any of the crimes charged."

Later, the defendant offered a modified version of this instruction in which the word "witnesses" was substituted for the name "Jewel Henderson." The trial court refused to give either version, but did give the following pattern instruction:

> "The believability of a witness may be challenged by evidence that on some former occasion the witness made a statement that was not consistent with his testimony in this case and evidence of this kind may be considered by you only for the purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom." Illinois Pattern Jury Instructions, Criminal, No. 6.11 (2d ed. 1981).

The instruction given does not fit the situation in this case, because the instruction refers to a prior statement by a witness which contradicts the evidence given by that witness at trial. It does, however, state the purpose for which such contradicting evidence may be used and specifies that the prior contradicting statement may be considered only for the purpose of deciding the weight to be given to the testimony given in court. In considering whether the court committed reversible error in refusing the two instructions tendered by the defendant, we must consider not only the pattern instruction on inconsistent statements, which the court gave, but also the oral instruction given by the court following the introduction of the evidence in question, which informed the jury that this evidence was to be considered for impeachment purposes. We find that the jury was informed of the limited use of this evidence. Any error or irregularity in the oral instruction given following the introduction of the evidence was waived by the defendant's failure to object or to request further instruction.

[3] During rebuttal argument, the prosecution made the following statement:

> "This case comes to you with five eyewitnesses, and admission that he changed his color—changed the color of his hair."

An objection to this statement was overruled. The defendant now argues that this statement amounts to "substantive" use of the evidence in violation of the limited purpose for which it was admitted.

We disagree. Control of closing argument is largely left to the discretion of the trial court and every presumption must be indulged in that the court has properly exercised that discretion. (*People v. Smothers* (1975), 55 Ill.2d 172, 302 N.E.2d 324.) Moreover, the reference to the defendant's statement was made on rebuttal argument, after defense counsel had argued as to the reasons Jewel Henderson would not lie for defendant. In that context, the reference was relevant to the issue of Ms. Henderson's truthfulness and was not a wholly unwarranted line of argument. Moreover, the statement quoted was little more than a passing reference. The defendant's statement was not dwelled upon or made the focus of the argument. The jury was instructed as to the purpose for which defendant's statement could be used. In light of the other strong evidence of defendant's guilt, we hold that any error resulting from this brief reference was harmless.

For all the above reasons, the judgment of the appellate court is reversed, and the judgment of the circuit court is affirmed.

APPELLATE COURT REVERSED; CIRCUIT COURT AFFIRMED.

Justice WARD, dissenting:

The reason for the majority's holding is seductively presented: to prevent an accused from manipulating the exclusionary rule in such a way as to permit the use of perjury in his defense. I consider that an invincible problem with the holding, however, is that it permits the impeachment of a witness' credibility on the ground of an inconsistent statement, not made by the witness himself, but by another person and, further, that the impeaching would be by means of illegally procured evidence that had been suppressed in the very case. Justice Clark in his dissent cites decisions that hold such evidence cannot be used to impeach the testimony of anyone other than the defendant upon whose motion the evidence was suppressed. This is only sensible; to hold otherwise would be to contradict the nature of impeachment. McCormick, Evidence § 33 (3d ed. 1984).

Too, the trial court compounded its error of permitting impeachment of the witness by the suppressed statement of the defendant. The judge instructed the jury at that time:

> "It's offered for the purpose of impeaching [*sic*] the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red."

The jury thus was told that the suppressed evidence was being admitted and being used as substantive evidence to contradict the testimony of the witness. Deep-

or confusion resulted when the trial court formally gave Illinois Pattern Jury Instructions, Criminal, No. 3.11 (2d ed. 1961), which is set out in the majority opinion. Considering what had occurred the instruction was irrelevant. It did not, as the majority opinion states, "fit the situation in this case." 123 Ill.2d at 540, — Ill.Dec. at —, 528 N.E.2d at 730.

The trial court continued to confuse impeachment with rebuttal and, as the appellate court opinion noted, permitted the prosecution in final argument to make use of suppressed evidence substantively in rebuttal. (McCormick, Evidence § 23 (2d ed. 1964).) The majority responds to the complaint that the court permitted this use of the suppressed evidence by commenting that control of closing argument is within the discretion of the trial court and that it will be presumed that the discretion was properly exercised. As an abstract proposition, that is undeniable, but it is obvious that it does not answer the complaint that the suppressed evidence was used in rebuttal. We cannot innocently indulge the presumption that the court properly exercised discretion when the record shows error in its exercise. Another aspect of the majority's view with which I cannot agree is that it appears to gratuitously assume that a witness' testimony will be perjurious or at least erroneous. To illustrate, the opinion contains statements such as: "Also, it must be apparent that the untrue statement of the witness * * *" (123 Ill.2d at 537, — Ill.Dec. at —, 528 N.E.2d at 729) and "So long as the defendant and his witnesses testify truthfully and refrain from testifying in a manner inconsistent with that evidence, the defendant retains the benefits of suppression" (123 Ill.2d at 538, — Ill.Dec. at —, 528 N.E.2d at 729-730). The majority does not consider that there simply might be differing impressions or recollections by the defendant and the witness.

For these reasons, I must respectfully dissent.

Justice STAMOS joins in this dissent.

Justice CLARK, also dissenting:

Because I cannot acquiesce in this judicial repeal of the fourth amendment, I strongly and categorically dissent.

The majority reaches out to achieve a result which is at best suggested, and hardly compelled, by the Supreme Court's case law and by our own. In fact, the few cases directly on point, which the majority does not cite or distinguish, clearly hold that suppressed evidence cannot be admitted to "impeach" or rebut the testimony of any witness other than the defendant himself. (See *United States v. Hinckley* (D.C.Cir. 1982), 672 F.2d 115; *State v. Burnett* (Mo. 1982), 627 S.W.2d 660 (*en banc*); *People v. Walls* (1973), 42 A.D.2d 575, 344 N.Y.S.2d 435; *State v. Kilborn* (1968), 143 Vt. 360, 466 A.2d 1178; *State v. Hubbard* (1965), 103 Wash.2d 570, 693 P.2d 718; see also 4 W. LaFave, Search & Seizure § 11.6(a), at 495-96 (2d ed. 1987).) The majority's contrary decision is, for several reasons, simply mistaken.

First, the majority relies upon a reading of the applicable case law which is, to say the least, extremely tendentious. It is well-settled that under the fourth amendment exclusionary rule evidence obtained in violation of the amendment must be suppressed and may not be introduced at trial. (*Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; *Nardone v. United States* (1939), 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307; *Silverthorne Lumber Co. v. United States* (1920), 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.) In other words, the prosecution may not use illegally obtained evidence as substantive evidence of the defendant's guilt. Nor is this restriction limited to the prosecution's case in chief:

> "[The] Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." (*Walder v. United States* (1954), 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503, 507.)

Any other rule would unduly encourage law enforcement authorities to violate the fourth amendment routinely so as to garner evidence which could be held in reserve, thereby inhibiting the accused from presenting evidence in his own defense.

There are some situations in which illegally obtained evidence may be used. Outside of the trial context, such evidence may be used, for example, to locate witnesses identified by the evidence (*Michigan v. Tucker* (1974), 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182) or to question witnesses during grand jury proceedings (*United States v. Calandra* (1974), 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561). Under the Federal Constitution, illegally obtained evidence may also be used as substantive evidence of the defendant's guilt so long as it is the product of a facially valid warrant executed by law enforcement authorities acting in good faith. (*United States v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677.) Of course, none of these exceptions are pertinent to this case. The only two exceptions which might even arguably apply are the use of illegally obtained evidence to either (1) impeach a defendant's credibility either on cross-examination or direct (*United States v. Havens* (1980), 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559; *Oregon v. Hass* (1975), 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed. 2d 570; *Harris v. New York* (1971), 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1; 4 W. LaFave, Search & Seizure § 11.6(a) (2d ed. 1987); see also *Walder v. United States* (1954), 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503) or to (2) respond to defense tactics which seek to take extraordinary advantage of the fact of suppression and thereby "open the door" to the admission of the suppressed evidence (*Walder v. United States* (1954), 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503, 507; *United States ex rel. Castillo v. Fay* (3d Cir.1965), 350 F.2d 400; *People v. Payne* (1963), 98 Ill.2d 45, 74 Ill.Dec. 542, 456 N.E.2d 44; *Commonwealth v. Wright* (1975), 234 Pa.Super. 83, 339 A.2d 103; 4 W. LaFave, Search & Seizure § 11.6(b) (2d ed. 1987)). The majority's opinion confuses these two distinct exceptions and thereby creates a rationale for the admission of illegally garnered evidence far broader than any actually contained in these cases.

As to the first, or impeachment, exception, the majority ignores the language in the Supreme Court cases clearly limiting it to the defendant who testifies. For example, the *Havens* Court, commenting on its earlier cases of *Harris* and *Hass*, noted:

> "In both cases, the Court stressed the importance of arriving at the truth in criminal trials, as well as the *defendant's* obligation to speak the truth in response to proper questions. We rejected the notion that the *defendant's* constitutional shield against having illegally seized evidence used against him could be 'perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.' * * *
>
> * * * We have repeatedly insisted that when *defendants* testify, they must testify truthfully or suffer the consequences." (Emphasis added.) *Havens*, 446 U.S. at 626, 100 S.Ct. at 1914, 64 L.Ed.2d at 565-66.

Not a line of *Harris* or *Havens* suggests that their holdings are intended to apply to witnesses other than the defendant.

Moreover, it is clear that both *Harris* and *Havens* are premised at least partially upon a waiver theory utterly inapplicable to witnesses other than the defendant. "Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." (*Harris*, 401 U.S. at 225, 91 S.Ct. at 645-46, 28 L.Ed.2d at 4.) The interpretation of *Harris* as an example of waiver is not, as the majority seems to suggest, merely a commentator's theory or the defendant's own invention. In *State v. Burnett* (Mo.1982), 627 S.W.2d 660, the Missouri Supreme Court adopted the same interpretation:

"In each of the United States Supreme Court cases, including *Havens*, the Court recognized that the defendant's right not to have illegally seized evidence used against him, but found a waiver of that right when and if the defendant testified in his own defense in the manner set forth in those cases. It was the defendant who was not to be allowed the benefit of the exclusionary rule so as to permit him to freely commit perjury. This constituted a waiver as to rebuttal evidence directly contradicting the defendant's testimony.

In the instant case, the defendant did not testify and, therefore, cannot be held to have waived his Fourth Amendment rights with respect to the suppressed evidence so as to permit its introduction as impeachment of his direct testimony. There was no testimony of the defendant to impeach."

Waiver, of course, does not apply to a witness who may testify voluntarily or under process, may or may not be telling the truth, and is in any case no mere surrogate for the defendant. We are long past the days when a party was held to "vouch for" his witness and to be bound by what his witness said. Moreover, the majority's contention that Jewel Henderson perjured herself is speculation, unsupported by anything in the record.

A second distinction between this case and the impeachment cases is that those cases involved impeachment, "a traditional truth-testing device of the adversary process," whose value outweighed the benefits of the exclusionary rule in that particular instance. But, as the majority's use of quotation marks around the word "impeachment" suggests, the use of the defendant's statement to rebut Jewel Henderson's testimony is not impeachment as traditionally understood. In usual practice, a witness may be impeached by reference to his own prior inconsistent statements. I have yet to hear of a case in which a witness was impeached by the use of *someone else's* prior inconsistent statements. If I testify to something at trial, the fact that I previously said something else may tend to prove that I am lying. But the fact that someone else has previously said something inconsistent proves nothing at all.

For this reason, the trial court's instruction to the jury that "evidence that the defendant made statements following his arrest may be considered by you only as it may affect the believability of Jewel Henderson" made no sense. Under traditional rules of evidence, the defendant's statement could have come in as a prior inconsistent statement if he testified, or as a party-admission, even if he did not. In the first case it would have constituted impeachment, and in the second case, substantive evidence. But its use to "impeach" the testimony of another witness is wholly unprecedented—and flows solely from the attempt to shoehorn the facts of this case into the narrow confines of *Harris* and *Havens*. It is therefore not surprising that the prosecution, the defense counsel, and the court all stumbled so badly over the question of instructing the jury. The only pattern jury instruction available clearly referred to the witnesses' prior inconsistent statements, not the defendant's.

It is true that a witness may sometimes be impeached by extrinsic facts if the facts are not collateral. Noncollateral facts include "facts relevant to substantive issues in the case," "facts which are independently provable by extrinsic evidence to impeach or disqualify the witness," (*e.g.*, bias, interest, conviction of crime, etc.) and, lastly, ordinarily collateral facts which are so vital to the witnesses' story that proof of them will tend to disprove it, "the contradiction of any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true." (McCormick, Evidence § 47, at 90 (2d ed. 1972).) McCormick nowhere suggests that extrinsic proof as to any of these three types of facts can include the prior contradictory statement of someone other than the witness. None of McCormick's examples of the third type of exception involve statements of another witness: See, *e.g.*, *East Tennessee V. & G. Ry. Co. v. Daniel* (1890), 91 Ga. 769, 19 S.E. 22 (witness who claimed to see incident while stopping to buy tobacco impeached by testimony of storekeeper that he did not stop to buy tobacco); *Stephens v. People* (1859), 19 N.Y. 549, 572 (witness who claimed that arsenic was kept to kill rats in cellar where provisions were kept impeached by witness who testified that no provisions were kept in cellar); *Commonwealth v. Jackson* (Ky. 1955), 281 S.W.2d 891 (impeachment by inconsistent statement of witness). I have yet to find a case where a defense witness was impeached by evidence of the defendant's statements.

Of course, the real crux of the matter is the exclusionary rule, not evidence law. But the confusion about impeachment points up the confusion in the majority's opinion. The color of the defendant's hair was not a collateral issue—it was clearly material because it directly related to his identity and his guilt. Therefore the State was free to use extrinsic evidence to prove the color of his hair on the day in question. That is not really the question. The real question is whether the State can use suppressed evidence to prove that extrinsic fact. Normally such evidence could be admitted—both to impeach the witness and as substantive evidence, without any limiting instruction. But *Walder*, *Harris*, and *Havens* seem to limit the admission of suppressed evidence to impeachment—evidence admitted not as substantive proof of the defendant's guilt, but only as tending to prove that he is not telling the truth. This distinction, while obviously fragile, would be completely destroyed by the majority's decision.

In fact, although the majority's opinion is not clear on this point, admission of the defendant's statement makes sense not as impeachment but as rebuttal, substantive evidence introduced to contradict a specific point in the defendant's evidence. In other words, what the majority really means is that a defendant who puts on a defense thereby waives his fourth amendment right to the exclusion of suppressed evidence which contradicts his defense. While I will deal with the merits of this position below—and its impact on the exclusionary rule—I would note here only that it is far removed from the narrow impeachment exception recognized in *Harris* and *Havens*.

The second possible exception to the exclusionary rule, the "opening the door" exception, is also inapplicable. A defendant does not open the door to the admission of suppressed evidence merely by mounting a defense. Instead, he must engage in "tactics which * * * seek to gain extraordinary" advantage from the *fact of suppression*." (Emphasis added.) (4 W. LaFave, Search & Seizure § 11.6(b), at 497 (2d ed. 1987).) One typical tactic, for example, is to affirmatively assert the nonexistence of the suppressed evidence, or to berate the prosecution for failing to produce it. For example, in our own case of *People v. Payne* (1983), 98 Ill.2d 45, 49-50, 74 Ill.Dec. 342, 456 N.E.2d 44, defense counsel, through cross-examination, gave the misleading impression that a search of the defendant's apartment had been fruitless. (See also *Walder v. United States* (1954), 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503, 507 (defendant made sweeping assertion that he had never in his life possessed drugs); *United States ex rel. Castillo v. Fay* (2d Cir.1965), 350 F.2d 409 (defense counsel gave misleading impression on cross-examination by eliciting response that no narcotics had been found during search; State allowed to rebut with evidence of narcotics paraphernalia); *Commonwealth v. Wright* (1975), 234 Pa.Super. 82, 339 A.2d 103 (defense counsel created confusion during cross-examination as to whether admitted packet of heroin had ever been chemically analyzed, confusion which could only be alleviated by reference to nine other packets which had been suppressed).) In this case, if defense counsel argued that his client was innocent because he had not while in police custody made any statements, I would have not hesitated to hold that he had "opened the door" to at least a limited admission of the fact that defendant had made certain statements. But if merely presenting a witness whose testimony contradicts suppressed evidence "opens the door" to its admission, then the fourth amendment has only a very limited meaning. This I cannot accept.

Even were the majority's use of the pertinent case law less questionable and more accurate, I would still be deeply troubled by its treatment of, and attitude towards, the fourth amendment exclusionary rule. The rule is not some legal ninety invented to bedevil hapless prosecutors and policemen. It is our only bulwark against the most common and hurtful abuses of governmental power. It expresses the long-held view that:

"The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution, at 49 (1937).

After today's decision, a police officer deciding whether to "cross the threshold of the ruined tenement" in violation of the law will know that anything he finds there can be used as substantive evidence of the defendant's guilt so long as the defendant presents any evidence in his own defense. That knowledge can only weaken his incentive to obey the law.

In response, the majority argues that the effect of its decision will not, after all, be very great, since few defendants will actually present "perjured" testimony. Leaving aside the question of how we are to determine whether testimony is in fact perjurious, this argument is premised upon a profound misunderstanding of the purpose of the exclusionary rule. Preventing the admission of reliable evidence which tends to prove the guilt of the defendant is not its ultimate purpose, although that is its immediate effect. The ultimate purpose of the rule is to deter improper police conduct. (*Dunaway v. New York* (1979), 442 U.S. 200, 217–18, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824, 839; *People v. White* (1967), 117 Ill.2d 194, 236, 111 Ill.Dec. 289, 512 N.E.2d 677; *People v. Gabbard* (1979), 78 Ill.2d 98, 98–99, 34 Ill.Dec. 751, 398 N.E.2d 574.) The principal beneficiaries of the rule's deterrent effect are not the criminals in whose cases the rule is applied but society at large: "all those citizens who never break laws more serious than those prohibiting overtime parking" (Dworkin, *Fact Style Adjudication & the Fourth Amendment: The Limits of Lawyering*, 48 Ind.L.J. 329, 330–31 (1973)) but are nevertheless protected from illegal searches and seizures.

Therefore, the number of defendants who will present perjured testimony and so suffer the admission of illegally obtained rebuttal evidence is simply irrelevant. Law enforcement officials contemplating illegal activity have no way of knowing in advance whether the persons subjected to that activity will eventually attempt to present a defense inconsistent with the evidence the officers may garner, and if so whether their illegally obtained evidence may be useful for rebuttal. Whether the number of admissions is few or many, the knowledge that the evidence may eventually prove useful—either to deter a defendant from presenting inconsistent evidence or to rebut evidence actually presented—cannot help but influence police behavior.

It is true that this effect will be limited by the inability of the State to use illegally obtained evidence on its case in chief. Where law enforcement authorities know in advance that the only evidence against a potential defendant can only be obtained through unlawful means they may hesitate. But in any case in which the police officers can, through lawful means, acquire enough evidence to make out a case against a suspect, they will be strongly tempted to secure additional evidence illegally.

I would not argue that we will face an epidemic outbreak of police illegality overnight. Our law enforcement authorities have lived with the exclusionary rule for over 60 years. Habit, custom, and residual respect for the law will doubtless prevent any sudden increase in the number of illegal searches and seizures. But eventually the more ambitious and aggressive policemen and prosecutors, engaged as they are in the highly competitive business of ferreting out crime, will discover a handy new tool in their arsenal. I am not so sanguine about human nature as to believe that they will all be scrupulous enough not to use it.

We are all members of a court which adopted the exclusionary rule decades before it was applied to the States. (*People v. Brocamp* (1923), 307 Ill. 448, 138 N.E. 723.) With this case we take a significant step towards its weakening and eventual disintegration. Since I cannot agree with this view, I dissent, and would affirm the undivided holding of the appellate court.

Justice STAMOS joins in this dissent.

HARDIN COUNTY EDUCATION ASSOCIATION, IEA–NEA, Petitioner,

v.

ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD and Hardin County Community Unit School District No. 1, Respondents.

The BOARD OF EDUCATION OF HARDIN COUNTY COMMUNITY UNIT SCHOOL DISTRICT NO. 1, Petitioner,

v.

ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD and Hardin County Education Association, IEA–NEA, Respondents.

Nos. 4–87–0490, 4–87–0506.

Appellate Court of Illinois, Fourth District.

Aug. 18, 1988.

County education association sought review of State Educational Labor Relations Board decision that school district's dismissal of high school teacher was not unfair labor practice, and district appealed Board's ruling that it committed unfair labor practices in other respects. The Appellate Court, Spitz, J., held that: (1) under *Wright Line* test, association failed to establish prima facie case of discriminatory discharge and district in any event met its burden of proving by preponderance of evidence that teachers' discharge would have occurred absent protected activities, and (2) Board's other decisions—that placement of reprimand in another teacher's file based on her response to student's question about reasons for teacher's dismissal and questioning of counselor regarding her union affiliation, as well as affiliation of another teacher, were unfair labor practices—were not against manifest weight of the evidence.

Affirmed.

1. Labor Relations ⇐506

Educational Labor Relations Board is not bound to interpret Educational Labor Relations Act as NLRB or the federal courts have interpreted the National Labor Relations Act. S.H.A. ch. 48, ¶ 1701 et seq.; National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

2. Labor Relations ⇐561

Wright Line "but for" test—shifting burden of proof to employer to demonstrate by preponderance of evidence that discharge occurred for legitimate reasons once complaining party establishes prima facie case of discriminatory discharge—is to be applied in discriminatory discharge cases under Educational Labor Relations Act. S.H.A. ch. 48, ¶ 1714(a)(3).

3. Administrative Law and Procedure ⇐749

Findings and conclusions of administrative agency on questions of fact are considered prima facie true and correct upon review. S.H.A. ch. 110, ¶ 3–110.

4. Administrative Law and Procedure ⇐763, 791

Courts may not interfere with discretionary authority vested in administrative agency unless that authority is exercised in arbitrary or capricious manner or adminis-

APPENDIX B

APPENDIX C

facts presented here, no amendment of defendant's counterclaim would state a cause of action.

The trial court did not abuse its discretion in denying defendant's motion for leave to file another amended counterclaim.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

RIZZI and WHITE, JJ., concur.

153 Ill.App.3d 131
106 Ill.Dec. 327

PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Darryl JAMES, Defendant-Appellant.

No. 84-640.

Appellate Court of Illinois, First District, Third Division.

Feb. 25, 1987.

Defendant was convicted in the Circuit Court, Cook County, R. Eugene Pincham, J., of murder and attempted murder. Defendant appealed. The Appellate Court, McNamara, P.J., held that State's use of defendant's suppressed statements to impeach testimony of another defense witness constituted reversible error.

Reversed and remanded.

1. Witnesses ⇐390

State may use defendant's statement, held inadmissible pursuant to Fourth or Fifth Amendment violation, to impeach defendant's credibility if defendant takes stand and testifies. U.S.C.A. Const. Amends. 4, 5.

2. Witnesses ⇐390

State may use suppressed fruits of Fourth Amendment violation to impeach defendant's perjurious testimony at trial. U.S.C.A. Const.Amend. 4.

3. Criminal Law ⇐1170½(1)
Witnesses ⇐406

State could not use defendant's suppressed statements to impeach testimony of defense witness where defendant did not testify, and State's use of those statements, which pertained to identification, constituted reversible error since identification was a major issue of case and court failed to instruct jury properly on use to be made of evidence.

Steven Clark, Deputy Defender, Karen Michels, Assistant Appellate Defender, Office of the State Appellate Defender, Chicago, for defendant-appellant.

Richard M. Daley, State's Atty., Chicago (Michael E. Shabat, Mary Ellen Dienes, Sharon Johnson Coleman, of counsel), for plaintiff-appellee.

Presiding Justice McNAMARA delivered the opinion of the court:

Defendant Darryl James was convicted after a jury trial of murder and attempted murder and the court sentenced him to concurrent terms of 30 years for murder and 15 years for attempted murder. On appeal, defendant, who was 15 years old at the time of the offense, contends that his Fourth Amendment rights were violated when the trial court admitted defendant's previously suppressed statement to impeach the testimony of a defense witness when defendant did not testify at trial.

On August 30, 1982, at approximately 11:00 p.m., police officers arrived at the scene of a shooting. They found Geliria Boyd and Delbert Collins shot and lying in the grass. Boyd, who was shot in the head, died shortly thereafter. Several eyewitnesses volunteered information to the police officers. The five witnesses to the crime who testified for the State at trial were all friends and members of a group called "the B Boys".

The victims and all of their friends, eight or nine in total, were returning from visiting a friend when they passed a group of three persons. One of the three individuals asked the larger group if anyone had money, and when his demand was not met, pulled a handgun and fired shots into the larger group. One witness heard four or five shots.

The five State witnesses described two of the offenders as being 6'1" and the other offender as being about 5'4". They described the taller individuals as wearing dark jackets while the shorter offender, who fired the gun, wore a striped ski jacket. All three were wearing baseball caps. One of the witnesses gave police the name of a person he thought was one of the offenders. Police arrested this suspect and questioned him, but later released him when the same witness said this was not the person he thought.

The five witnesses who testified for the State all made in court identifications of defendant, who was taken into custody the day after the occurrence. At trial, defendant was wearing his hair in a natural style and it was black. All witnesses testified that the person responsible for the shooting had reddish hair and wore it in a slicked back butter style and also wore an earring. When giving descriptions of the offenders to the police, none of the witnesses said anything about the hair color or style of the person who shot the victims. One witness stated he did tell detectives at the police station that the person responsible for the shooting had red hair and a light complexion. The witnesses testified that they recalled seeing defendant a few weeks before the shooting at the Bud Billiken Parade and that they remembered his appearance because of his red butter hairstyle and the earring in his left ear.

Jewel Henderson, a friend of defendant's family, testified for defendant that on the day of the shooting, she took defendant to register for high school and on that day his hair was black. Defendant did not testify at trial.

To rebut Henderson's testimony, the State sought to introduce a previously suppressed statement of defendant. After a hearing on the voluntariness of defendant's suppressed statement, the trial court, over defendant's objection, permitted the State to introduce the statement.

The suppressed testimony which the trial court allowed in revealed that while in police custody on August 31, defendant stated that on the evening of August 30, his hair was long and combed back straight and reddish brown. He added that he had gone to the beauty parlor to have his hair dyed and curled to change his appearance. The trial court previously suppressed the statement after finding that there was not probable cause to arrest defendant, and thus the statement was the fruit of an unlawful arrest.

Following the police officer's testimony regarding the suppressed statement, the trial court told the jury that such evidence was offered for the purpose of impeaching and rebutting Henderson's testimony. The trial court, however, refused defendant's proffered jury instruction explaining that defendant's statement could be considered only for purposes of determining the believability of the witness and could not be used substantively.

During rebuttal closing argument, the prosecutor stated, "[T]his case comes to you with five eyewitnesses, an admission that he changed his color—changed the color of his hair." The trial court overruled defendant's objection that this was a substantive use of the suppressed testimony.

On appeal, defendant contends it was a violation of his Fourth Amendment rights to allow his previously suppressed statement to impeach and rebut the testimony of a defense witness. Defendant's statement was suppressed at a pre-trial hearing after the judge found it to be the fruit of an unlawful arrest. Defendant did not testify at trial.

[1, 2] The State may use defendant's statement, held inadmissible pursuant to a Fourth or Fifth amendment violation, to impeach defendant's credibility if defendant takes the stand and testifies. (*Walder v. United States* (1954), 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503; *Oregon v. Hass*

(1975), 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570; *Harris v. New York* (1971), 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1.) Furthermore, the State may use the suppressed fruits of a Fourth Amendment violation to impeach defendant's perjurious testimony at trial. (*United States v. Havens* (1980) 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559; *People v. Brown* (1976) 40 Ill.App.3d 1003, 353 N.E.2d 244.) The *Havens* court assessed the competing interests of the truth seeking function of the courts and the interests sought to be protected by the exclusionary rule and held that a defendant's testimony is subject to impeachment by the government although by evidence that has been illegally obtained and that is inadmissible in the government's direct case-in-chief as substantive evidence of guilt. There is no justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility. *Walder v. United States.*

[3] The matter before us differs from those cases in that defendant did not testify. Here, the State seeks to use defendant's suppressed statements to rebut the testimony of another defense witness. When a defendant testifies, courts will allow otherwise inadmissible evidence to prevent a defendant from directly perjuring himself and then hiding behind the Fourth or Fifth Amendment. However, when a defendant has not testified, as is the case here, defendant has taken no affirmative steps which would act in the same way to deprive him of his constitutional rights. In the present case, the statement defendant made regarding the color of his hair was determined to be the fruit of an unlawful arrest, and there is no authority under which such a statement may be used to impeach the testimony of another witness.

The State urges that *People v. Finkey* (1982), 105 Ill.App.3d 220, 61 Ill.Dec. 81, 434 N.E.2d 18, is the authority by which this court should allow admission of defendant's statements. In *Finkey*, defendant did not testify at trial, yet the State offered suppressed statements to rebut defendant's insanity defense. In setting out the insanity defense, a psychiatrist testified for the defense that defendant lacked substantial capacity either to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct. This conclusion was based on the doctor's examination of defendant at which defendant told the doctor that he had learned of his own criminal involvement from the hospital personnel. Since this was the basis of the doctor's conclusion, the trial court allowed suppressed testimony of a police officer which showed, through a conversation with defendant, that defendant had some recall of the criminal events. This court held that a defendant cannot be allowed to establish a *prima facie* insanity defense by his representations to a psychiatrist without affording the State an opportunity to challenge the veracity of those statements.

The reasoning of *Finkey* does not extend to the present case. Unlike *Finkey*, the State here is not rebutting an affirmative defense set up by defendant. Under the guise of impeachment, the State is trying to use inadmissible evidence to rebut the testimony of a defense witness. Defendant did not testify and has not forfeited his Fourth Amendment rights. See also *United States v. Hinckley* (D.C.Cir.1982), 672 F.2d 115.

This issue has been addressed by other jurisdictions. In New York, the court has refused to extend the Fourth Amendment impeachment exception to the examination of a defense witness. (*People v. Walls* (1973), 344 N.Y.S.2d 435, 42 A.D.2d 575.) There, defendant's statement in which he admitted his participation in a felony-murder was suppressed because of a *Miranda* violation. Defendant did not testify at trial but in his defense, his mother testified that she was present at defendant's interrogation and she did not hear him admit his participation in the crime. The State attempted to rebut the mother's testimony with defendant's suppressed statements. The court held, however, that the time-honored device of testing credibility by confronting the witness with prior inconsistent statements would not be available when the witness is not the person who made the statements claimed to be inconsistent. The *Walls* court stated that, if allowed, this would indeed result in a case where the exception swallows up the rule.

In effect, the State is attempting to use evidence obtained in violation of defendant's Fourth Amendment rights to impeach and rebut a defense witness. We refuse to make such an exception to the exclusionary rule. Were we to hold otherwise, we would provide little or no deterrence against further Fourth Amendment violations and the State would be able, under the guise of impeachment, to use any illegally obtained evidence relevant to the principal issues in the case.

The State argues that even if the trial court erred in admitting defendant's suppressed statement, such error was harmless in light of the other evidence of defendant's guilt. A reversal on constitutional grounds is not warranted if it can be determined beyond a reasonable doubt that the error was harmless. (*Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.) There was ample evidence of defendant's guilt independent of defendant's statements. Nevertheless, identification was a major issue of the case, with defendant questioning the credibility of the State identification witnesses. Defendant's statement, allegedly allowed in only for impeachment purposes, directly reflects on the issue of identification as well as defendant's guilt.

Moreover, not only was the jury allowed to hear defendant's suppressed statement, but the court failed to instruct the jury properly on the use to be made of this evidence. After reciting that defendant's statement was being offered to impeach the defense witness, the court said that the statement was also offered to refute and rebut that testimony. This comment in effect is a substantive use of the evidence. Furthermore, the trial court refused defense counsel's request for further limiting instruction and allowed the State to make substantive use of defendant's suppressed statements in its rebuttal closing argument.

In our view, the jury could not avoid being influenced by the State's improper use of defendant's statement and for that reason we cannot say beyond a reasonable doubt that the error was harmless. We believe that a new trial is required.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and the case is remanded for a new trial.

Judgment reversed and remanded.

RIZZI and WHITE, JJ., concur.

153 Ill.App.3d 113
106 Ill.Dec. 330

GRIFFIN SYSTEMS, INC., a foreign corporation, Plaintiff-Appellant,

v.

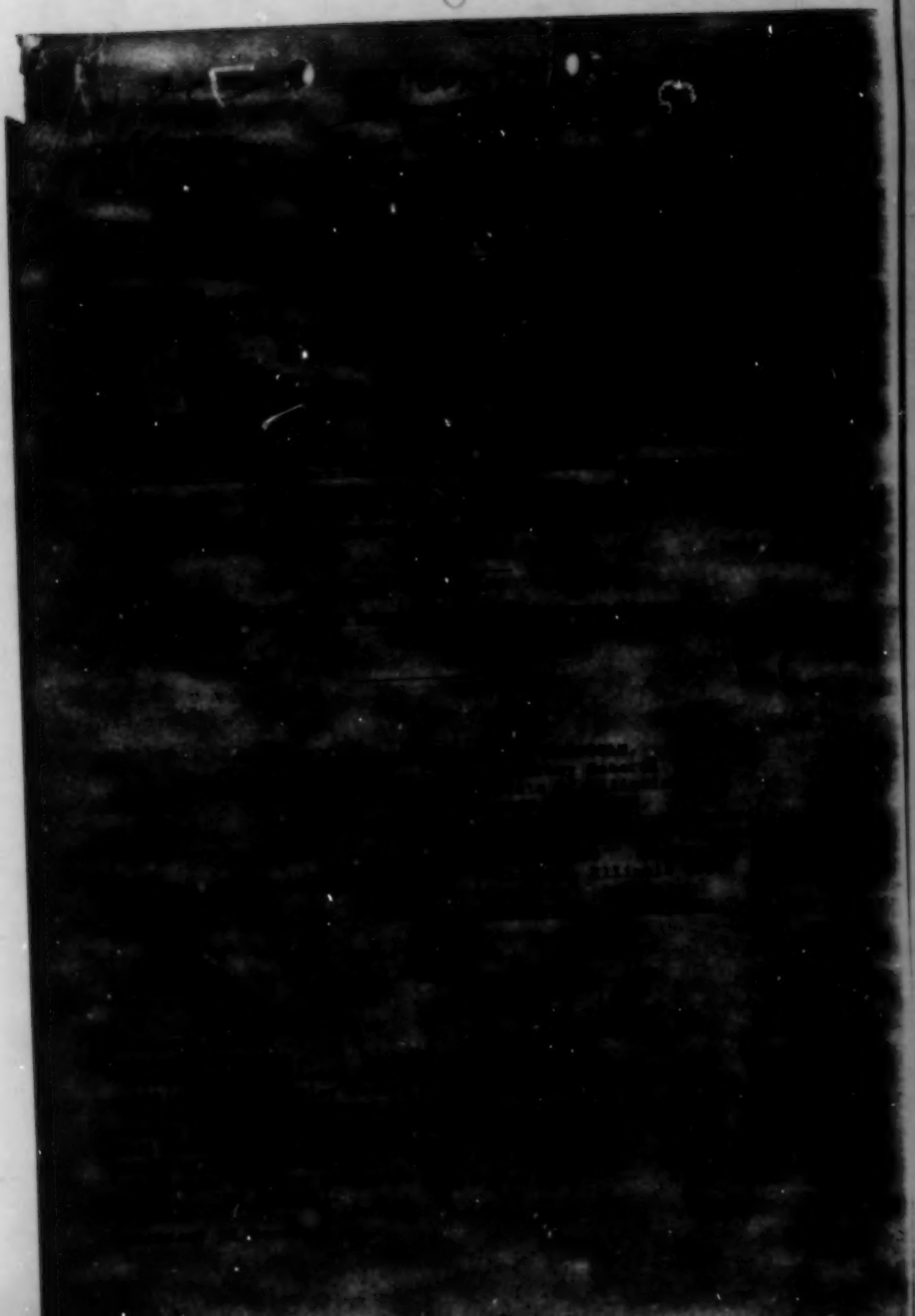
John E. WASHBURN, Illinois Director of Insurance, Illinois Department of Insurance, Defendants-Appellees.

No. 85-3781.

Appellate Court of Illinois,
First District, Fourth Division.

Feb. 26, 1987.

State Department of Insurance issued cease and desist order against out-of-state corporation which sold automobile parts indemnity plan within state, and corporation appealed. The Circuit Court, Cook County, George M. Marovich, J., agreed with Department's finding that corporation was engaged in selling of insurance without certificate of authority, affirmed order, and corporation appealed. The Appellate Court, Linn, J., held that: (1) plan constituted insurance contract rather than service contract or warranty, and thus, corporation had engaged in selling insurance without certificate of authority; (2) Department's original cease and desist order was supported by evidence; and (3) state's right



QUESTION PRESENTED FOR REVIEW

Whether petitioner's statements, previously suppressed on Fourth Amendment grounds, may be used to rebut the testimony of a defense witness other than the petitioner.

TABLE OF CONTENTS

Question Presented For Review..... i

Table of Contents..... ii

Table of Authorities..... iii

Opinion Below..... 1

Jurisdiction..... 1

Statement of the Case..... 2

Reason for Denying the Writ:

THE TRIAL COURT PROPERLY ADMITTED PETITIONER'S SUPPRESSED STATEMENTS TO CHALLENGE AND CONTRADICT THE DIRECT EXAMINATION TESTIMONY OF PETITIONER'S OWN WITNESS, WHERE THAT TESTIMONY DIRECTLY CONTRADICTED PETITIONER'S SUPPRESSED STATEMENTS AND PETITIONER DID NOT TESTIFY; AND THUS PREVENTED PETITIONER FROM ABUSING THE EXCLUSIONARY RULE BY USING IT AS A SHIELD FOR KNOWING PERJURY..... 6

Conclusion..... 14

TABLE OF AUTHORITIES

Cases:

Harris v. New York, 401 U.S. 222, 28 L.Ed.2d 1, 91 S.Ct. 643 (1971)	6,7, 8,9, 10,11, 12,13
People v. Payne, 98 Ill. 2d 45, 456 N.E.2d 44 (1983)	11,12, 13
State v. Burnett, 637 S.W.2d 680 (Mo. 1982)	12
State v. Hubbard, 103 Wash. 3d 570, 693 P.2d 718 (1985)	12
United States v. Havens, 446 U.S. 620, 64 L.Ed.2d 559, 100 S.Ct. 1912 (1980)	6,7,9 10,11,12 13
United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982)	12,13
Walder v. United States, 347 U.S. 62, 98 L.Ed. 503, 74 S.Ct. 354 (1954)	6,7,8, 9,10,11, 12,13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DARRYL JAMES,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Supreme Court, affirming petitioner's circuit court convictions for murder and attempt murder and reversing the contrary judgment of the Illinois Appellate Court is reported at 123 Ill. 2d 523, 528 N.E.2d 423 (1988).

JURISDICTION

The jurisdictional requisites have been set forth in the Petition for Writ of Certiorari. However, the respondent believes that the petition has failed to show any good reason for this Court to exercise jurisdiction to review the judgment in question by writ of certiorari.

STATEMENT OF THE CASE

Petitioner Darryl James, was convicted of the murder of Gerilia Boyd and the attempt murder of Delbert Collins. The incident occurred on the night of August 30, 1982, in Chicago, Illinois, when petitioner and two companions demanded money from a group of eight boys.

At the pre-trial proceedings, the trial court granted petitioner's motion to suppress evidence stemming from the arrest. (R. 60) The petitioner was arrested at his mother's beauty shop, where police discovered petitioner sitting under a hair dryer with curlers in his hair. (R. 19,20) Among the evidence suppressed was petitioner's statements admitting he had changed his hair color from reddish-brown to black in order to change his appearance. (Supp. R. 95-96, 136-137) Petitoner's motion to suppress was granted on the grounds of lack of probable cause for arrest.

In their case-in-chief, the People presented the testimony of five eyewitnesses to the Boyd-Collins shooting: John Brown, Perry Brown, Kenneth Brown, Darryl Hall and Delbert Collins. According to the testimony of each of the five boys, they were walking home from a party on the night of August 30, 1982, when three boys approached them and demanded money. (R. 293, 339, 385-87, 407-8, 427-28) When no money was surrendered, one member of the trio pulled out a gun and shot into the group of boys. (R. 302) Witness John Brown described the shooter as 5 feet 4 inches tall, light-complexioned, wearing an earring and a dark brown baseball cap, and having long reddish-brown hair combed straight back. (R. 294, 300-01) The other four witnesses to the shooting corroborated John Brown's testimony. (R. 343, 391, 412, 430)

At trial each of the five eyewitnesses pointed to petitioner and identified him as the person who shot Gerilia Boyd and Delbert Collins. The witnesses stood firm in their identification despite their acknowledgement that petitioner's hair was black in color and natural in style at the time of trial, which was two years after the incident. Four of the witnesses testified that they had seen petitioner two weeks before the shooting incident at a parade and at that time petitioner's hair was long, red and slicked back. (R. 294-5, 340, 388-9, 408, 429)

The petitioner's primary witness and close family friend, Ms. Jewel Henderson, testified in direct contradiction to the testimony of the five prosecution eyewitnesses. She testified that she had never seen petitioner wear a cap or an earring. Ms. Henderson further testified that petitioner did not have red hair on August 30, 1982. (R. 500-04) The petitioner chose not to testify.

In rebuttal, the People sought to introduce petitioner's statements to police that shortly after the shooting on August 30th, petitioner had changed his hair color from reddish-brown to black. (Supp. R. 62) Petitioner's counsel objected to the use of the statements on the grounds that they had been suppressed because of Fourth Amendment violations. (Supp. R. 63-4) Nonetheless, the court allowed the use of petitioner's statements to rebut or refute Ms. Henderson's testimony that petitioner had black hair, not red, on the night of the shooting. (R. 64) Petitioner's counsel then moved to suppress petitioner's statements on the grounds that the statements were involuntary. (Supp. R. 115) The trial court suspended the trial, held a hearing on the motion, and then denied petitioner's motion, finding that petitioner's statements

were voluntary. (Supp. R. 128) Defendant's statements that on August 30, 1982 his hair was reddish-brown, long and combed straight back were presented to the jury. A police officer testified that defendant had admitted that he had changed his hairstyle and hair color in order to change his appearance. (Supp. R. 136-137) After petitioner's counsel cross-examined the officer, the trial court orally instructed the jury that petitioner's statements about his red hair were offered solely to refute and rebut his own witness' testimony. (Supp. R. 145)

In surrebuttal, two relatives of petitioner testified that petitioner's only hair color had been black. (Supp. R. 148-154) The jury then deliberated and found petitioner guilty of the murder of Gerilia Boyd and guilty of the attempt murder and aggravated battery of Delbert Collins. (Supp. R. 250)

Petitioner appealed his convictions to the Illinois Appellate Court, which reversed the convictions and remanded the case for a new trial. The appellate court held that the admission of petitioner's suppressed statement to rebut the testimony of a witness other than petitioner was improper. The court reasoned that the exclusionary rule would be "swallowed up" by the exceptions, if it were to uphold the trial court's actions.

The Illinois Supreme Court reversed the appellate court decision by holding that when the direct testimony of a defense witness "squarely contradicts" suppressed evidence, then the suppressed evidence may be admitted to rebut the testimony of that witness. In so holding the Illinois court relied on the legal principles espoused by this Court in Walder v. United States, 347 U.S. 62, 98 L.Ed 503, 74 S.Ct. 354 (1954); Harris v. New York, 401 S. 222, 28 L.Ed 2d 1, 91 S.Ct. 643 (1971); and United States v. Havens, 446 U.S. 620, 64 L.Ed2d 539, 100 S.Ct.

1912 (1980), which the Illinois court had previously applied in People v. Payne, 98 Ill. 2d 45 (1983). The state supreme court then affirmed petitioner's convictions for murder and attempt murder and later denied petitioner's request for rehearing.

REASON FOR DENYING THE WRIT

THE TRIAL COURT PROPERLY ADMITTED PETITIONER'S SUPPRESSED STATEMENTS TO CHALLENGE AND CONTRADICT THE DIRECT EXAMINATION TESTIMONY OF PETITIONER'S OWN WITNESS WHERE THAT TESTIMONY DIRECTLY CONTRADICTED PETITIONER'S SUPPRESSED STATEMENTS AND PETITIONER DID NOT TESTIFY; AND THUS PREVENTED PETITIONER FROM ABUSING THE EXCLUSIONARY RULE BY USING IT AS A SHIELD FOR KNOWING PERJURY.

Petitioner contends that the Illinois Supreme Court improperly expanded the impeachment exception to the exclusionary rule to include the use of a defendant's suppressed statements to rebut the testimony of a defense witness where a defendant does not testify. Petitioner argues that the state court's ruling does not comport with this Court's decisions concerning exceptions to the exclusionary rule.

At petitioner's trial for murder and attempt murder, five prosecution eyewitnesses to the crime described the offender as having reddish-brown, slicked back hair. Their in-court identifications of defendant as the offender were positive, despite the difference in color, length and style of petitioner's hair at the time of trial. Each witness was throughly cross-examined regarding his identification.

In his defense, petitioner's primary witness was family friend Ms. Jewel Henderson. Ms. Henderson testified on direct examination that petitoner's hair was black in color on the night of the shooting. Even as Ms. Henderson testified, petitioner knew that he had told the police at the time of his arrest that his hair had been red on the night of the incident. Petitioner

was also aware that the statements concerning his red hair color were suppressed as fruits of an illegal arrest. Petitioner knew that his friend's testimony directly contradicted his suppressed statements.

The prosecution and the trial court were also aware of the contradiction, and in rebuttal, the prosecution was allowed to introduce petitioner's statements into evidence in order to rebut Ms. Henderson's testimony concerning petitioner's hair color on the night of the incident.

The Illinois Supreme Court upheld the trial court's ruling and announced a narrow exception to the exclusionary rule which would allow the use of suppressed evidence to impeach the direct testimony of a defense witness, which "squarely contradicts" the suppressed evidence. In reaching its decisions the state court relied on this Court's decisions in Walder v. United States, 347 U.S. 62, 98 L.Ed 503, 74 S.Ct. 354 (1954); Harris v. New York, 401 U.S. 222, 28 L.Ed.2d 1, 91 S.Ct. 643 (1971); United States v. Havens, 446 U.S. 620, 64 L.Ed 2d 559, 100 S.Ct. 1912 (1980).

In Walder, this Court first espoused the "impeachment exception" to the exclusionary rule. Defendant, charged with buying and selling narcotics, testified on direct examination that he had never been involved with the sale or possession of narcotics in any way. At the time of his testimony, defendant knew that his earlier charge of delivering heroin had been dismissed based on the suppression of illegally obtained evidence. 347 U.S. at 62-63, 98 L.Ed.2d at 506, 94, S.Ct. at 355.

After defendant's testimony, the prosecution was allowed to introduce rebuttal evidence of defendant's prior arrest for heroin for the sole purpose of impeaching defendant's credibility. While acknowledging the prohibitions of the

exclusionary rule, this Court upheld the admission of the suppressed evidence. Mr. Justice Frankfurter wrote:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Goverment's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment. 347 U.S. at 65, 98 L.Ed. at 507, 74 S.Ct. at 356.

This Court expanded the impeachment exception in Harris v. New York, where defendant's testimony on direct and cross-examination "contrasted sharply" with the inculpatory statements made to police shortly after his arrest. 401 U.S. 222, 28 L.Ed.2d 1, 91 S.Ct. 643 (1971). This Court determined that although defendant's post-arrest statements were suppressed because of a Miranda violation and those statements had a direct bearing on the case at trial, the admission of the statements for impeachment purposes was proper. 401 U.S. at 225, 28 L.Ed.2d at 4, 915 S.Ct. at 645. While the Walder holding was limited to impeachment of defendant on collateral matters brought out in defendant's direct testimony, the Harris Court stated, "we are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in Walder." Id.

More recently the principles set forth in both Walder and Harris were relied on and expanded by this Court in United States v. Havens, 446 U.S. 620, 64 L.Ed.2d 559, 100 S.Ct. 1912 (1980). In Havens, this Court held that the Government's impeachment of defendant's testimony on cross-examination with suppressed evidence did not violate defendant's constitutional rights. 446 U.S. at 629, 64 L.Ed.2d at 566, 100 S.Ct. 1917. The fact that the Havens court upheld the impeachment of defendant's testimony brought out on cross-examination with suppressed evidence, indicates this Court's unwillingness to allow the abuse of the exclusionary rule as a shield for perjury.

Mr. Justice White wrote:

> We also think that the policies of the exclusionary rule no more bar impeachment here than they did in Walder, Harris, and Hass. In those cases, the ends of the exclusionary rules were thought adequately implemented by denying the government the use of the challenged evidence to make out its case in chief. The incremental furthering of those ends by forbidding impeachment of the defendant who testifies was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial. We reaffirm this assessment of the competing interests,. . . 446 U.S. at 627-28, 64 L.Ed.2d 566, 100 S.Ct. at 1916-17.

The Illinois Supreme Court thoroughly reviewed and relied on the Walder, Harris and Havens decisions to affirm the admission of the suppressed evidence in the present case. The factual situations presented in the above three cases are similar to that in the instant case: evidence was suppressed based on a fourth or fifth amendment violation; defense presented testimony which squarely contradicted the suppressed evidence; and the trial court allowed the suppressed evidence to be presented for impeachment purposes. The main factual distinction from this Court's line of decisions is that it was not petitioner but one of his witnesses who testified in contradiction of the suppressed statement.

Petitioner argues that this distinction takes his case out of the realm of the "impeachment exception" cases. For petitioner's argument to have merit, this Court must rule that a defendant is not responsible for evidence produced in his defense unless it comes from his own mouth. The Illinois Supreme Court rejected this argument, stating:

> In our view, if a defendant is prohibited from using perjury by way of a defense it matters not from whose lips that perjury comes. Just as a defendant may not directly perjure himself and then hide behind the exclusionary rule, he also cannot be allowed to use perjurious testimony through a biased defense witness, in this case, the principal defense witness, without affording the prosecution an opportunity to challenge the veracity of that testimony. 123 Ill. 3d 523, 536.

The state court also disagreed with petitioner's claim that the expansion of the impeachment exception would have a detrimental effect on the exclusionary rule. The petitioner claims that police and prosecutors will no longer be deterred from violating constitutional rights in obtaining evidence. Petitioner further contends that the rule announced by the Illinois Supreme Court would allow the prosecution to use the tainted evidence to "impeach the testimony of any witness a defendant might call." (Petitioner Br. 11)

On the contrary, the Illinois Supreme Court emphasized in careful detail the limited circumstances in which its ruling would apply. The use of suppressed evidence to rebut testimony of defense witnesses will be allowed only as to statements made by the witness on direct examination, which amounts to a clear contradiction of defendant's suppressed statements. "It must be apparent that the testimony of the witness, if false, has been purposely presented by the defendant." 123 Ill. 3d 523, 537. The court further emphasized that the exception does not apply to any part of a suppressed statement which could be characterized as a confession. Id.

In 1983, the Illinois Court looked to this Court's decisions in Walder and Havens and upheld the admission of suppressed evidence to correct a misimpression created by the defense's cross-examination of a prosecution witness. People v. Payne, 98 Ill. 2d 45, 456 N.E.2d 44 (1983). In Payne, defense counsel cross-examined one of the arresting officers on whether the defendant's apartment had been searched. The officer answered affirmatively and then defense counsel concluded his questioning. The jury was left with the false impression that the search had been fruitless when in fact the fruits of the search had been suppressed. Id. at 49, 509. In upholding the

admission of the suppressed evidence the Illinois court reasoned:

> If a defendant procures, invites or acquiesces in the admission of evidence, even though it be improper, he cannot complain. 98 Ill. 2d at 50.

The direction shown by Walden, Harris, Havens, and their progeny is clear: this Court will not allow the defense or prosecution to misrepresent the actual facts of a case under the protection of the exclusionary rule.

The petitioner also points to the cases of State v. Burnett, 637 S.W.2d 680 (Mo. 1982) State v. Hubbard, 103 Wash.2d 570, 693 P.2d 718 (1985), and United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982), to support his contentions. All three cases are distinguishable from the case at hand.

In State v. Burnett, the defendant did not testify, but the prosecution's questions of defense witness on cross examination made reference to the suppressed evidence. The Supreme Court of Missouri held that if Havens was applicable to witnesses other than defendant, the outcome of Burnett would be the same because of the prosecution's scheme to set up the admission of the suppressed evidence on cross-examination. 637 S.W.2d 680, 690 (Mo. 1982).

In a 6 to 3 decision, the Washington Supreme Court reversed a lower court ruling that statements obtained in violation of Miranda can be admitted as substantive evidence to rebut testimony given by any defense witness. State v. Hubbard, 103 Wash. 2d 570, 693 P.2d 718, 720 (1985). If such a ruling were appealed to the Illinois Supreme Court, it would surely be

reversed in light of the instant case, which holds that the admission of suppressed evidence for impeachment purposes will only be permitted under the most limited circumstances.

The government's argument in United States v. Hinckley 672 F.2d 115 (D.C.Cir. 1982), was that insanity is an affirmative defense, not part of the prosecution's case-in-chief, and therefore defendant's statements, procured in violation of Miranda, can be used in rebuttal without jeopardising constitutional principles. The government also argued that if the defense puts forth testimony by an expert witness on the defendant's mental state, that testimony is tantamount to the defendant taking the stand himself. The Hinckley court rejected the government's theories. 672 F.2d at 132-134.

Clearly the ruling of the Illinois Supreme Court, in the instant case, would not support such a broad, all-encompassing argument. The Illinois court applied the principles set forth by this Court in Walden, Harris and Havens and its own decision of People v. Payne to the facts of the instant case to reach its decision to narrowly expand the impeachment exception.

The Illinois Supreme Court's holding preserves the deterrent ends of the exclusionary rule by denying the prosecution the use of suppressed evidence to make its case-in-chief and also preventing the affirmative exploitation of the suppressed evidence by the defense. Petitioner's argument fails to show a need for this Court in its sound discretion to grant his petition. The ruling of the Illinois Supreme Court is novel, but based on a clear line of decisions by this Court. Therefore this case does not warrant this Court to review the Illinois Supreme Court's decision.

CONCLUSION

The People of the State of Illinois respectfully request this Honorable Court to deny the petition for writ of certiorari in the above matter.

Respectfully submitted,

NEIL F. HARTIGAN,
Attorney General
State of Illinois
TERENCE M. MADSEN,
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601

Attorneys for Respondent.

RICHARD M. DALEY
State's Attorney
Cook County, Illinois,
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496
INGE FRYKLUND,
SHARON JOHNSON COLEMAN,*

Assistant State's Attorneys
Of Counsel.

*Attorney of Record.

FILED
APR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-6075

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RECEIVED
HAND DELIVERED
APR 20 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DARRYL JAMES,
Petitioner,

v.

ILLINOIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

JOINT APPENDIX

THEODORE A. GOTTFRIED
State Appellate Defender
MICHAEL J. PELLETIER
Deputy Defender
MARTIN S. CARLSON *
Assistant Appellate Defender
100 W. Randolph Street
State of Illinois Center
Suite 5-500
Chicago, Illinois 60601
(312) 917-5472
Counsel for Petitioner

* Counsel of Record

NEIL F. HARTIGAN
Attorney General,
State of Illinois
ROBERT J. RUIZ
Solicitor General,
State of Illinois
TERENCE M. MADSEN *
Assistant Attorney General
100 W. Randolph Street
State of Illinois Center
12th Floor
Chicago, Illinois 60601
(312) 917-2235
Counsel for Respondent

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 2, 1988
CERTIORARI GRANTED FEBRUARY 21, 1989

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries	1
Transcript of Proceedings:	
Testimony of Jewel Henderson	
Direct Examination	2
Cross Examination	6
Re-Direct Examination	8
Testimony of Steven Glynn	
Direct Examination	9
Cross Examination	11
Re-Direct Examination	11
Oral Limiting Instruction, Given	12
Defendant's Limiting Instructions, Refused	13
Excerpts from Rebuttal Closing Argument for the Prosecution	13
People's Instruction No. 1, Given	15
People's Instruction No. 8, Given	16
Opinion of the Illinois Appellate Court, First District, February 25, 1987	17
Opinion of the Supreme Court of Illinois, July 20, 1988	24
Order of the Supreme Court of Illinois dated October 3, 1988, denying rehearing	54
Order of the Supreme Court of the United States granting certiorari and leave to proceed *in forma pauperis*, February 21, 1989	55

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

December 23, 1982—Indictment filed in the Circuit Court of Cook County, Illinois charging petitioner Darryl James with murder, armed violence, attempt murder and aggravated battery.

April 13, 1983—Petitioner's motion to suppress evidence filed.

December 7, 1983—Hearing held on motion to suppress evidence; motion sustained.

January 6, 1984—Petitioner's jury trial commenced.

January 12, 1984—Argument heard on the prosecution's motion to introduce petitioner's suppressed statements in rebuttal; motion allowed in part.

January 12, 1984—Hearing held on the voluntariness of petitioner's statements; court finds that the statements were voluntary.

January 12, 1984—Closing arguments heard and jury receives instructions from the court.

January 13, 1984—Jury returns verdicts finding petitioner guilty of murder, attempt murder and aggravated battery.

February 17, 1984—Petitioner sentenced to concurrent terms of 30 years for the offense of murder and 15 years for attempt murder.

February 25, 1987—Opinion of the Illinois Appellate Court, First District, reversing petitioner's convictions and remanding for a new trial filed.

July 20, 1988—Opinion of the Supreme Court of Illinois reversing the judgment of the Illinois Appellate Court filed.

October 3, 1988—Order of the Supreme Court of Illinois denying rehearing filed.

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

Indictment No. 82-C-12075

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

v.

DARRYL JAMES,
Defendant.

TRANSCRIPT OF PROCEEDINGS

January 10, 1984

• • • •

[501]

DIRECT EXAMINATION

BY MR. CLARK:

MR. CLARK: Q. Miss Henderson, I would like you to speak up and address your comments as much as possible to the jury.

Would you, please, state your name and spell your last name?

A. Jewel Henderson, H-e-n-d-e-r-s-o-n.

Q. Miss Henderson, what is your business or occupation?

A. I'm a student at Truman College.

Q. And did you, at any point prior to being a student at Truman College, been employed?

A. Yes.

Q. Where was that?

A. Chicago Sun Times.

Q. What did you do at the Sun Times?

A. CRT classified.

Q. How long did you work at the Sun Times?

A. A year and six month.

[502] Q. Do you know a young man by the name of Darryl James?

A. Yes, I do.

Q. Is that Mr. James seated at the table in the black shirt?

A. Yes, it is.

Q. How long have you known Darryl James?

A. About seven years.

Q. Where do you live, Miss Henderson?

A. 676 East 38th Place.

Q. Do you live there now?

A. No.

Q. When did you live there?

A. Last year. I moved from there in August.

Q. August of when?

A. 83.

Q. How long had you lived at that address?

A. Fourteen years.

Q. Do you know the family of Darryl James?

A. Yes, I do.

Q. How long have you known his family?

A. About five years.

Q. I would like to call your attention to August 30 of 1982.

[503] Did you see Darryl that day?

A. Yes, I did.

Q. Directing your attention to the first time that you saw him on that day, please explain to the jury the circumstances.

A. He was at the shop.

Q. And what—

A. At Diane's Beauty House.

Q. What, if anything, did you and Darryl do after you saw him at the shop on the 30th of August?

A. We played cards that day.

Q. Did you go any place?
A. I left the shop later on that evening.
Q. Did you take him to school at all?
A. Yes.
Q. Where did you take him?
A. To South Shore High School.
Q. For what purpose?
A. To register him.
Q. Did you take him to any other school?
A. Yes.
Q. What school was that?
A. Phillips High School.
Q. For what purpose did you go there?
[504] A. To pick up his transcripts.
Q. Was he transferring from Phillips to South Shore?
A. Yes.
Q. During the day, did you notice the color of Darryl's hair?
A. Yes.
Q. What color was it?
A. Black, same color as mine.
Q. Was he wearing an earring?
A. No.
Q. Was he wearing a cap?
A. No.
Q. You have—have you known him to wear a cap over the period of time that you have known him?
A. No.
Q. Do you recall viewing the Bud Biliken Parade in August of 1982?
A. Yes.
Q. From where did you view it?
A. From Diane's Beauty House.
Q. Who is Diane?
A. Darryl's mother.
Q. Where is Diane's Beauty Shop?
[505] A. 366 47, King Drive.

Q. Is that on the corner of 47th and King?
A. Yes.
Q. How many people were present at that location, if you can recall?
A. Between 10 and 12.
Q. Can you recall whether or not Darryl was there?
A. Yes, he was.
Q. Why did you view the parade from the beauty shop rather than on the street?
A. It was a better sight to see and not being hassled with the crowd.
Q. Is—was there a large crowd watching the Bud Biliken Parade?
A. Yes.
Q. Showing you what's been marked as Defendant's Exhibit Number 4 for identification, do you recognize that and please explain to the jury what it is?
A. Yes. This is Diane's Beauty House on the second floor, the three, four—it has nine windows all located inside of her shop, the corner of 47th and King Drive.
[506] Q. Is that the way it looked in August of 1982?
A. Yes.
Q. That's a different time of year in the photograph, isn't it?
A. Yes. Yes, it is winter.
Q. Showing you what's been marked Defendant's Exhibit Number 5 for identification, do you recognize that?
A. Yes.
Q. Will you, please, explain what that is?
A. This is—this is out the window, houses on the picture right here from Diane's Beauty Shop—a picture tooken out of the window, houses right here on the picture.
Q. The house on the picture—that's the sign that's in the window?
A. Yes.

Q. Showing you what's been marked as Defendant's Exhibit Number 6 for identification, do you recognize that?

A. Yes.

Q. What is it?

A. This is where Diane and Darryl James live.

Q. Who else lives there with him?

[507] A. His sister.

Q. What's her name?

A. Prumona. (Phonetic)

Q. Referring, again, to Defendant's Exhibit Number 6, which floor do they live on?

A. Third.

Q. Miss Henderson, over the period of time that you have known Darryl James, have you also come in contact with other people who know him?

A. Yes.

Q. Would those be people who live in his neighborhood?

A. Yes.

Q. How many, would you say?

A. Mostly everyone.

Q. The neighborhood that you lived in in 1982 and that Darryl lived in, what's it called?

A. CHA, Ida B. Wells.

Q. And based upon your contact with people who know Darryl, do you have an opinion as to his reputation for being a violent or non-violent person?

A. Being non-violent.

MR. CLARK: No further questions.

[508] CROSS EXAMINATION

BY MR. LUCHSINGER:

MR. LUCHSINGER: Q. Miss Henderson, you said you have known Mr. James about seven years?

A. Yes.

Q. Have you ever seen him with an earring in his ear?

A. No.

Q. Never?

A. No.

Q. Have you ever looked closely at his left ear?

A. Yes, I have.

Q. Is there a hole there where an earring once was?

A. Not now.

Q. Not now?

Miss Henderson, were you with Darryl at about 11:00 o'clock on the evening of the 30th?

A. Yes.

Q. Where were you?

A. At his mother's house.

Q. What time did you get to his mother's house?

A. About 9:00, 9:30, somewhere about that time. I'm not exactly sure.

[509] Q. Was Darryl there when you got there?

A. No, he wasn't.

Q. When did Darryl arrive?

A. Somewhere about—between 10 and 11.

Q. Sometime between 10 and 11?

A. Yes. I'm not for sure.

Q. How was he dressed when he arrived?

A. He had on casual clothes. I really didn't pay him any attention—pay him any attention, but he had on casual clothes, trousers, top.

Q. Can you be more specific? What time did he get home?

A. I can't be more specific because I don't wear a watch, and we had been playing the cards that night, between 10 and 11.

Q. What time did you leave?

A. I stayed all night.

Q. You stayed all night?

A. Yes.

Q. After Darryl came in, did he ever leave?
A. No.
Q. Did you see him with anyone else?
A. No. He came in with his mother.
Q. Did he say where he had been?
[510] A. I know where he had been.
Q. How do you know where he had been?
A. They had just come from the shop. Diane had called home and said that they were on their way home.
Q. So, as far as you know, he was with his mother the whole time, is that right?
A. Yes.
Q. Who else was playing cards?
A. Darryl's brother, myself, his sister, and two other friends.
Q. Just so it's clear, Miss Henderson, you are sure you have never seen Darryl with an earring?
A. Yes, I'm sure.
Q. And you're sure he hasn't got a hole where an earring once was?
A. Not any more—not any more.
MR. LUCHSINGER: That's all I have.
MR. REYES: One moment, Judge.
MR. REYES: Nothing further.
MR. LUCHSINGER: Nothing further.
THE COURT: You may step down.
MR. CLARK: No.
THE COURT: You have something else?
MR. CLARK: Yeah.
[511] THE COURT: Just a moment, please.

REDIRECT EXAMINATION

BY MR. CLARK:

MR. CLARK: Q. Do you see Darryl's mother in court?
A. Yes.

Q. Would you, please, point her out? Please describe her.
A. Second—second row, second person.
Q. And—
A. Third person.
Q. How about his brother?
A. I see him, too.
Q. Where is he?
A. Same row, fourth person.
Q. Do you have—do your ears have holes that were at one time opened—that would take an earring?
A. That were closed?
Q. That are closed now?
A. Yes.
MR. CLARK: No further questions.
MR LUCHSINGER: No further questions.

• • • •

January 12, 1984

• • • •

[S-135] MR. LUCHSINGER: We call Officer Glynn.

(Witness entered and was sworn.)

STEVEN GLYNN,

a witness herein, called to testify on behalf of the People of the State of Illinois in rebuttal, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LUCHSINGER:

Q Tell us your name once again.
A Detective Steven Glynn, G-l-y-n-n.
Q You are the same officer that testified a couple of days ago?
A Yes, I am.

Q Directing your attention to the 31st of August, 1982, did you place Mr. James under arrest?

A Yes, I did.

Q Did you have a conversation with him on that date?

A Yes, I did.

Q Where did you first speak with him?

MR. CLARK: May I be heard?

THE COURT: No, no. I won't hear you on that. I know what you are going to say.

MR. CLARK: I don't think you do.

[S-136] MR. LUCHSINGER: I will clear it up.

Q Did you speak with him in your squad car?

A Yes, I did.

Q Was it parked at the time?

A Yes, it was

Q Who else was in the squad car?

A My partner, Detective Brian Regan, and Darryl James.

Q Did Darryl James tell you anything about the color of his hair?

A Yes, he did.

Q What did he tell you at that time?

A He told me that in the evening of the 30th of August that his hair was reddish brown, it was long and it was combed straight back.

Q Did you talk with Mr. James later on that night?

A Yes, I did.

Q Where was it that you talked to him again?

A In an interview room at Area 1 Violent Crimes at 31st and Wentworth.

Q About what time was that?

A It must have been about 10:30 in the evening.

Q Did he tell you anything then about the color of his hair?

A Yes, he did.

[S-137] Q What did he tell you?

A He was asked again about the color of his hair and the reason he was at the beauty parlor and he again said his hair—

THE COURT: I can't hear you.

THE WITNESS: He again said his hair was red, reddish brown on the evening of the shooting—

MR. CLARK: Objection.

THE COURT: Overruled.

Proceed.

THE WITNESS:—it was combed straight back, it was long and he had gone to the beauty parlor to have his hair done, to dyed black and curled in order to change his appearance.

MR. LUCHSINGER: Thank you. No further questions.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. CLARK:

Q Did you ever ask Mr. James to write down anything about his hair color?

A Did I?

Q Yes.

A No, sir. I did not.

Q Did you ever show him some notes that you had [S-138] written about his hair color and ask him to sign it?

A No, sir, I did not.

MR. CLARK: Nothing further.

* * * *

[S-141] REDIRECT EXAMINATION

BY MR. LUCHSINGER:

Q Officer Glynn, that night was Mr. James asked if he wanted to give a written statement?

A Not to my knowledge.

Well, not by me.

Q By whom?

MR. CLARK: Objection.

THE COURT: Overruled. He may answer.

MR. LUCHSINGER: Q Was he asked?

A State's Attorney Devlin did ask him later in the early morning hours which would have been the 1st I believe.

Q What was Mr. James' response as to whether he wanted to give a written statement?

A He stated he did not wish to give a written statement.

MR. LUCHSINGER: Thank you.

• • • •

ORAL LIMITING INSTRUCTION GIVEN

[S-144] THE COURT: Okay.

(The following proceedings were had in open court, in the hearing and presence of the jury:)

Do you have anything else, Mr. Clark?

MR. CLARK: No, sir.

THE COURT: Do you have anything?

MR. LUCHSINGER: No, sir.

MR. CLARK: You did not instruct the jury the purpose for which this testimony was received. I would ask that you do so.

THE COURT: It's offered for the purpose of impeaching [S-145] the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red.

What's next please?

MR. LUCHSINGER: We rest in rebuttal.

• • • •

DEFENDANT'S LIMITING INSTRUCTIONS REFUSED

[S-161] Evidence that the defendant made statements following his arrest may be considered by you only as it may affect the believability of Jewel Henderson. It may not be considered by you as evidence of the commission of any of the crimes charged.

[S-162] Evidence that the defendant made statements following his arrest may be considered by you only as it may affect the believability of witnesses. It may not be considered by you as evidence of the commission of any of the crimes charged.

• • • •

EXCERPTS FROM REBUTTAL CLOSING ARGUMENT FOR THE PROSECUTION

[S-208] CLOSING ARGUMENT

BY MR. LUCHSINGER:

• • • •

[S-215] Mr. Clark mentioned one other word earlier in his remarks about your consciences. Let me expand on that a little bit more. God gave us all, every human being, a free will and along with that free will he gave us something to keep that free will in check and the thing that he gave us to keep that free will in check was a conscience. Now, maybe you know it by something else but we all have experienced this. Call it a conscience, call it an inner voice, call it a pure light, call it the divine spirit, call it what you may but it is there. Every one of us has had a personal experience with their conscience. Think about it. I bet every one of us has lost at least one night's sleep because your conscience was bothering you. It might have [S-216] been something minor, might have been a little white lie that you told that day or it might have been an off-the-cuff remark to a loved one that is bothering you conscience and it gen-

uinely keeps you up at night. It does bother you, there is such a thing as a conscience. Or something that you did at work or something that happened at work that wasn't quite right that you feel responsible about, your conscience bothers you about it.

It is what tells us what is right and wrong. Our conscience helps us be the best people we can possibly be. Our conscience scolds us when we are wrong. Our conscience nags at us and says you did something wrong, why don't you try to do something about it and often times we act on that conscience. I know I have and I am sure every one of you has.

Now, as I said, everybody in this room has a conscience, even Darryl has a conscience; and Darryl's conscience got to him the night he told the police that he changed his hair color. That's why—

MR. CLARK: Objection.

THE COURT: Overruled. He may argue.

MR. LUCHSINGER: He did something terrible and had to do something about it. His conscience overcame him.

MR. CLARK: Objection.

[S-217] THE COURT: Overruled.

MR. LUCHSINGER: The same way that our consciences might overcome us and cause us to act in some way that we might not ordinarily act but for that conscience. That's what happened when he told the police that he changed his hair color.

• • • •

[S-219] This case comes to you with five eyewitnesses, an admission that he changed his color—changed the color of his hair.

MR. CLARK: Objection.

THE COURT: Overruled.

• • • •

PEOPLE'S INSTRUCTION NO. 1 GIVEN
(I.P.I. Criminal No. 1.01)

[S-219] THE COURT: Ladies and gentlemen of the jury, the evidence and arguments of counsel have been concluded and it [S-220] is now time for you to have me tell you what the law is that applies to this case. They call it instructions. I will read them to you; and as I told you before, you will be allowed to take them into the jury room with you during your deliberations.

The law that applies to this case is stated in these instructions and it is your duty to follow all of them. You must not single out certain instructions and disregard others.

It is your duty to determine the facts and to determine them only from the evidence in this case. You are to apply the law to the facts and in this way decide the case.

You are not to concern yourselves with possible punishment or sentence for the offenses charged during your deliberation. It is my job and my function to determine the sentence should there be verdicts of guilt.

Neither sympathy nor prejudice should influence you. You should not be influenced by any person's race, color, religion or national ancestry.

From time to time it has been the duty of the court to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You should disregard questions which were withdrawn or to [S-221] which objections were sustained.

Any evidence which was received for a limited purpose should not be considered by you for any other purpose.

You should also disregard testimony which the court has refused or stricken.

The evidence which you should consider consists only of the testimony of the witnesses and the exhibits which have been received into evidence.

You should consider all the evidence in the light of your own observations and experience in life.

Neither by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or as to what your verdicts should be.

Faithful performance by you of your duties as jurors is vital to the administration of justice.

* * * *

PEOPLE'S INSTRUCTION NO. 8 GIVEN
(I.P.I. Criminal No. 3.11)

[S-229] The believability of a witness may be challenged by evidence that on some former occasion the witness made a statement that was not consistent with his testimony in this case and evidence of this kind may be considered by you only for the purpose of deciding the weight to be given the testmony you heard from the witness in this courtroom.

* * * *

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 84-640

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

DARRYL JAMES,
Defendant-Appellant.

February 25, 1987

PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

Defendant Darryl James was convicted after a jury trial of murder and attempted murder and the court sentenced him to concurrent terms of 30 years for murder and 15 years for attempted murder. On appeal, defendant, who was 15 years old at the time of the offense, contends that his Fourth Amendment rights were violated when the trial court admitted defendant's previously suppressed statement to impeach the testimony of a defense witness when defendant did not testify at trial.

On August 30, 1982, at approximately 11:00 p.m., police officers arrived at the scene of a shooting. They found Geliria Boyd and Delbert Collins shot and lying in the grass. Boyd, who was shot in the head, died shortly thereafter. Several eyewitnesses volunteered information to the police officers. The five witnesses to the crime who

testified for the State at trial were all friends and members of a group called "the B Boys".

The victims and all of their friends, eight of nine in total, were returning from visiting a friend when they passed a group of three persons. One of the three individuals asked the larger group if anyone had money, and when his demand was not met, pulled a handgun and fired shots into the larger group. One witness heard four or five shots.

The five State witnesses described two of the offenders as being 6'1" and the other offender as being about 5'4". They described the taller individuals as wearing dark jackets while the shorter offender, who fired the gun, wore a striped ski jacket. All three were wearing baseball caps. One of the witnesses gave police the name of a person he thought was one of the offenders. Police arrested this suspect and questioned him, but later released him when the same witness said this was not the person he thought.

The five witnesses who testified for the State all made in court identifications of defendant, who was taken into custody the day after the occurrence. At trial, defendant was wearing his hair in a natural style and it was black. All witnesses testified that the person responsible for the shooting had reddish hair and wore it in a slicked back butter style and also wore an earring. When giving descriptions of the offenders to the police, none of the witnesses said anything about the hair color or style of the person who shot the victims. One witness stated he did tell detectives at the police station that the person responsible for the shooting had red hair and a light complexion. The witnesses testified that they recalled seeing defendant a few weeks before the shooting at the Bud Billiken Parade and that they remembered his appearance because of his red butter hairstyle and the earring in his left ear.

Jewel Henderson, a friend of defendant's family, testified for defendant that on the day of the shooting, she took defendant to register for high school and on that day his hair was black. Defendant did not testify at trial.

To rebut Henderson's testimony, the State sought to introduce a previously suppressed statement of defendant. After a hearing on the voluntariness of defendant's suppressed statement, the trial court, over defendant's objection, permitted the State to introduce the statement.

The suppressed testimony which the trial court allowed in revealed that while in police custody on August 31, defendant stated that on the evening of August 30, his hair was long and combed back straight and reddish brown. He added that he had gone to the beauty parlor to have his hair dyed and curled to change his appearance. The trial court previously suppressed the statement after finding that there was not probable cause to arrest defendant, and thus the statement was the fruit of an unlawful arrest.

Following the police officer's testimony regarding the suppressed statement, the trial court told the jury that such evidence was offered for the purpose of impeaching and rebutting Henderson's testimony. The trial court, however, refused defendant's proffered jury instruction explaining that defendant's statement could be considered only for purposes of determining the believability of the witness and could not be used substantively.

During rebuttal closing argument, the prosecutor stated, "[T]his case comes to you with five eyewitnesses, an admission that he changed his color—changed the color of his hair." The trial court overruled defendant's objection that this was a substantive use of the suppressed testimony.

On appeal, defendant contends it was a violation of his Fourth Amendment rights to allow his previously

suppressed statement to impeach and rebut the testimony of a defense witness. Defendant's statement was suppressed at a pre-trial hearing after the judge found it to be the fruit of an unlawful arrest. Defendant did not testify at trial.

The State may use defendant's statement, held inadmissible pursuant to a Fourth or Fifth amendment violation, to impeach defendant's credibility if defendant takes the stand and testifies. (*Walder v. United States* (1954), 347 U.S. 62, 98 L.Ed. 503, 74 S.Ct. 354; *Oregon v. Hass* (1975), 420 U.S. 714, 43 L.Ed.2d 570, 95 S.Ct. 1215; *Harris v. New York* (1971), 401 U.S. 222, 28 L.Ed.2d 1, 91 S.Ct. 643.) Furthermore, the State may use the suppressed fruits of a Fourth Amendment violation to impeach defendant's perjurious testimony at trial. (*United States v. Havens* (1980) 446 U.S. 620, 64 L.Ed. 2d 559, 100 S.Ct. 1912; *People v. Brown* (1976) 40 Ill. App. 3d 1003, 353 N.E.2d 244.) The *Havens* court assessed the competing interests of the truth seeking function of the courts and the interests sought to be protected by the exclusionary rule and held that a defendant's testimony is subject to impeachment by the government although by evidence that has been illegally obtained and that is inadmissible in the government's direct case-in-chief as substantive evidence of guilt. There is no justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility. *Walder v. United States.*

The matter before us differs from these cases in that defendant did not testify. Here, the State seeks to use defendant's suppressed statements to rebut the testimony of another defense witness. When a defendant testifies, courts will allow otherwise inadmissible evidence to prevent a defendant from directly perjuring himself and then hiding behind the Fourth or Fifth Amendment. However, when a defendant has not testified, as is the

case here, defendant has taken no affirmative steps which would act in the same way to deprive him of his constitutional rights. In the present case, the statement defendant made regarding the color of his hair was determined to be the fruit of an unlawful arrest, and there is no authority under which such a statement may be used to impeach the testimony of another witness.

The State urges that *People v. Finkey* (1982), 105 Ill. App.3d 230, 434 N.E.2d 18, is the authority by which this court should allow admission of defendant's statements. In *Finkey*, defendant did not testify at trial, yet the State offered suppressed statements to rebut defendant's insanity defense. In setting out the insanity defense, a psychiatrist testified for the defense that defendant lacked substantial capacity either to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct. This conclusion was based on the doctor's examination of defendant at which defendant told the doctor that he had learned of his own criminal involvement from the hospital personnel. Since this was the basis of the doctor's conclusion, the trial court allowed suppressed testimony of a police officer which showed, through a conversation with defendant, that defendant had some recall of the criminal events. This court held that a defendant cannot be allowed to establish a *prima facie* instanity defense by his representations to a psychiatrist without affording the State an opportunity to challenge the veracity of those statements.

The reasoning of *Finkey* does not extend to the present case. Unlike *Finkey*, the State here is not rebutting an affirmative defense set up by defendant. Under the guise of impeachment, the State is trying to use inadmissible evidence to rebut the testimony of a defense witness. Defendant did not testify and has not forfeited his Fourth Amendment rights. See also *United States v. Hinckley* (D.C. Cir. 1982), 672 F2d 115.

This issue has been addressed by other jurisdictions. In New York, the court has refused to extend the Fourth Amendment impeachment exception to the examination of a defense witness. (*People v. Walls* (1973), 344 N.Y.S. 2d 435, 42 A.D.2d 575.) There, defendant's statement in which he admitted his participation in a felony-murder was suppressed because of a *Miranda* violation. Defendant did not testify at trial but in his defense, his mother testified that she was present at defendant's interrogation and she did not hear him admit his participation in the crime. The State attempted to rebut the mother's testimony with defendant's suppressed statements. The court held, however, that the time-honored device of testing credibility by confronting the witness with prior inconsistent statements would not be available when the witness is not the person who made the statements claimed to be inconsistent. The *Walls* court stated that, if allowed, this would indeed result in a case where the exception swallows up the rule.

In effect, the State is attempting to use evidence obtained in violation of defendant's Fourth Amendment rights to impeach and rebut a defense witness. We refuse to make such an exception to the exclusionary rule. Were we to hold otherwise, we would provide little or no deterrence against further Fourth Amendment violations and the State would be able, under the guise of impeachment, to use any illegally obtained evidence relevant to the principal issues in the case.

The State argues that even if the trial court erred in admitting defendant's suppressed statement, such error was harmless in light of the other evidence of defendant's guilt. A reversal on constitutional grounds is not warranted if it can be determined beyond a reasonable doubt that the error was harmless. (*Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.) There was ample evidence of defendant's guilt independent of defendant's statements. Nevertheless,

identification was a major issue of the case, with defendant questioning the credibility of the State identification witnesses. Defendant's statement, allegedly allowed in only for impeachment purposes, directly reflects on the issue of identification as well as defendant's guilt.

Moreover, not only was the jury allowed to hear defendant's suppressed statement, but the court failed to instruct the jury properly on the use to be made of this evidence. After reciting that defendant's statement was being offered to impeach the defense witness, the court said that the statement was also offered to refute and rebut that testimony. This comment in effect is a substantive use of the evidence. Furthermore, the trial court refused defense counsel's request for further limiting instruction and allowed the State to make substantive use of defendant's suppressed statements in its rebuttal closing argument.

In our view, the jury could not avoid being influenced by the State's improper use of defendant's statement and for that reason we cannot say beyond a reasonable doubt that the error was harmless. We believe that a new trial is required.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and the case is remanded for a new trial.

Judgment reversed and remanded.

RIZZI and WHITE, JJ., concur.

IN THE SUPREME COURT OF ILLINOIS

No. 65049

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

DARRYL JAMES,
Appellee.

July 20, 1988
Rehearing Denied October 3, 1988

JUSTICE RYAN delivered the opinion of the court:

The defendant, Darryl James was convicted by a jury in the circuit court of Cook County of the murder of Gerilia Boyd and the attempted murder of Delbert Collins. The court sentenced the defendant to concurrent terms of 30 years for murder and 15 years for attempted murder. The appellate court reversed the convictions (153 Ill. App. 3d 131), and we granted the State's petition for leave to appeal (107 Ill. 2d R. 315).

The issues presented in this appeal all relate to the State's use of evidence, obtained in violation of the defendant's fourth amendment rights, to rebut the testimony of a defense witness other than the defendant.

The record in this case reveals that on August 30, 1982, at approximately 11 p.m., a group of eight boys was proceeding home from a party at the Ida B. Wells housing project in Chicago. Three other boys approached the group and demanded money. When no money was

surrendered, one member of the trio produced a gun and began shooting at the larger group. Gerilia Boyd was wounded and died as a result of the shooting. Delbert Collins, who was shot in the back, testified on behalf of the State at the defendant's trial.

Upon arriving at the scene of the shooting, the police questioned several eyewitnesses who volunteered information regarding the incident. Five of the eyewitnesses, including Delbert Collins, were members of a group called the "B Boys." The five State witnesses described two of the offenders as being 6 feet 1 inch tall and the third offender as being about 5 feet 4 inches tall. They told the police that all three were wearing ski jackets and baseball caps. The shortest of the three offenders fired the gun. One of the eyewitnesses gave the police the name of a person he thought was one of the offenders. Police arrested this suspect and questioned him, but later released him when the same witness said this person was not involved in the shooting. The record reveals that the arrested suspect told the police that two youths by the names of "Carey" and "Guam" were involved in the incident and that "Carey" was the shooter. "Carey" was also brought into the station, but was subsequently released when the eyewitness told police that "Carey" was also not one of the offenders.

The "B Boys" testified for the State at trial and all made in-court identifications of the defendant, who was taken into police custody on August 31, the day after the shooting. The police had found the defendant at his mother's beauty shop sitting under the hair dryer.

Each of the "B Boys" testified that the person responsible for the shooting had "reddish" hair, which he wore shoulder length in a slicked-back "butter" style, and also wore an earring. When giving descriptions of the offenders to the police immediately following the incident, none of the eyewitnesses said anything about the

hair color or hairstyle of the person who shot the victim. One witness did testify that he told a detective at the police station that the person responsible for the shooting had red hair and a light "reddish" complexion. Each of the witnesses recalled having seen the defendant a few weeks prior to the shooting at the Bud Billiken Parade. They remembered the defendant because of his red "butter" hairstyle and the earring in his left ear. At trial, the defendant's hair was black and he was wearing it in a "natural" style. He was not wearing an earring. Despite the discrepancy between the description given by the eyewitnesses immediately after the incident occurred and the defendant's physical appearance at trial, the "B Boys" stood firm in their identification of the defendant as the one who committed the shooting.

The defendant's principal witness at trial was Jewel Henderson, a friend of the defendant's family. She testified that on the day of the shooting she had taken the defendant to register for high school, and at that time the defendant's hair was black. To "impeach" and rebut Henderson's testimony, the State sought to introduce a previously suppressed statement of the defendant. Following a hearing on the voluntariness of the defendant's suppressed statement, the trial court, over the defendant's objection, permitted the State to introduce the statement.

The suppressed statement which the trial court admitted into evidence revealed that while in police custody on August 31, the defendant told the police that on the evening of August 30, his hair was long and combed back straight and "reddish" in color. He said that he had gone to his mother's beauty parlor on August 31 to have his hair dyed and curled to change his appearance. The trial court had suppressed this statement at a pretrial hearing after finding that there was no probable cause to arrest the defendant, and thus, that the statement was the fruit of an unlawful arrest.

Following the police officer's testimony regarding the defendant's suppressed statement, at the request of defendant, the trial court orally instructed the jury that the testimony was "offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red." The defendant made no objection to this instruction and suggested no change in it or any further instruction. At the close of the evidence, however, the trial court refused the defendant's proffered jury instruction explaining that the defendant's statement could be considered only for purposes of determining the believability of the witness and could not be used as substantive evidence of the defendant's guilt or innocence. These refused instructions and the instructions given relating to this issue will be discussed later.

The record further reveals that during rebuttal closing argument, the prosecutor stated, "[T]his case comes to you with five eyewitnesses, an admission that he changed his color—changed the color of his hair." Defense counsel's objection to this reference to the defendant's suppressed statement was overruled.

Defendant did not testify at trial. As noted previously, the jury found the defendant guilty of murder and attempted murder and the trial court sentenced the defendant on both counts.

Defendant appealed his convictions to the appellate court, arguing that his fourth amendment rights were violated when the trial court admitted the defendant's previously suppressed statements to impeach the testimony of defense witness Henderson. The appellate court reversed the defendant's convictions and ordered a new trial, finding that the admission of the defendant's suppressed statement was improper. The appellate court

also rejected the State's alternative argument that even if the trial court did err in admitting the defendant's suppressed statement, the error was harmless in light of the overwhelming evidence of the defendant's guilt. 153 Ill. App. 3d 131.

In its appeal before this court, the State maintains that the appellate court's reversal of the defendant's convictions was erroneous. Citing *United States v. Havens* (1980), 446 U.S. 620, 64 L. Ed. 2d 559, 100 S. Ct. 1912, *People v. Payne* (1983), 98 Ill. 2d 45, and *People v. Finkey* (1982), 105 Ill. App. 3d 230, the State contends that the trial court properly admitted the defendant's suppressed statements to impeach and rebut Henderson's testimony. The State again argues, in the alternative, that even if the trial court did err in admitting the defendant's suppressed statements, that error is harmless in light of the overwhelming evidence of the defendant's guilt.

It is, of course, the general rule that evidence obtained in violation of the fourth amendment may not be introduced into evidence at trial. (*Mapp v. Ohio* (1961), 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684; *Weeks v. United States* (1914), 232 U.S. 383, 58 L. Ed. 652, 34 S. Ct. 341.) However, while the exclusionary rule may have begun as an absolute bar on the use of such evidence (see *Agnello v. United States* (1925), 269 U.S. 20, 70 L. Ed. 145, 46 S. Ct. 4; *Silverthorne Lumber Co. v. United States* (1920), 251 U.S. 385, 64 L. Ed. 319, 40 S. Ct. 182), over the years a number of narrow exceptions to the rule have evolved.

One such exception applicable to the facts of this case has its origin in *Walder v. United States* (1954), 347 U.S. 62, 98 L. Ed. 503, 74 S. Ct. 354. The defendant in *Walder* was charged with four narcotics-related transactions. He had previously been indicted for purchase and possession of heroin, but those charges were dismissed

after a motion to suppress illegally obtained evidence was granted. 347 U.S. at 63, 98 L. Ed. at 506, 74 S. Ct. at 355.

The prosecutor's case consisted principally of the testimony of two government informers who had allegedly purchased drugs from Walder. Walder's defense consisted solely of his own testimony, during which he denied any narcotics dealings with the informers. Early in his direct examination, Walder testified as follows:

> " 'Q: Now, first, Mr. Walder, before we go further in your testimony, I want to you [*sic*] tell the Court and jury whether, not referring to these informers in this case, but whether you have ever sold any narcotics to anyone.
>
> A: I have never sold any narcotics to anyone in my life.
>
> Q: Have you ever had any narcotics in your possession, other than what may have been given to you by a physician for an ailment?
>
> A: No.
>
> Q: Now, I will ask you one more thing. Have you ever handed or given any narcotics to anyone as a gift or in any other manner without the receipt of any money or any other compensation?
>
> A: I have not.
>
> Q: Have you ever even acted as, say, have you acted as a conduit for the purpose of handling what you knew to be a narcotic from one person to another?
>
> A: No, sir.' "

347 U.S. at 63, 98 L. Ed. at 506, 74 S. Ct. at 355.

On cross-examination, in response to questioning about this direct testimony, Walder reiterated his assertion that he had never purchased, sold or possessed any narcotics. Over objection, the prosecution then questioned him about his previous drug arrest, and about the heroin which had been unlawfully seized. Walder denied that

any drugs had been taken from him at that time. Thereafter the prosecution introduced evidence of the prior search and seizure of the heroin. The trial court admitted this evidence, instructing the jury that it was to be used solely for the purpose of impeaching the defendant's credibility.

The Supreme Court upheld the admission of the evidence. In so doing, it acknowledged the general rule that the government may not use the fruits of an illegal search to secure a conviction. However, the Court went on to explain the rationale for the exception it was creating as follows:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.
>
> Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." 347 U.S. at 65, 98 L. Ed. at 507, 74 S. Ct. at 356.

This so-called "impeachment exception" to the exclusionary rule was expanded in *Harris v. New York* (1971), 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643. In that case, a prosecution for unlawful sale of heroin, the defendant's post-arrest inculpatory statements had been suppressed because they were obtained in violation of *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602. The defendant testified, and on direct examination admitted making a sale of the contents of a glassine bag to an undercover officer, but asserted that the substance was baking power. That testimony contradicted the defendant's post-arrest statements. *Harris*, 401 U.S. at 223, 28 L. Ed. 2d at 3, 91 S. Ct. at 644.

On cross-examination, the defendant was asked about those inconsistent statements, and he testified that he could not remember virtually any of the questions or answers recited by the prosecutor. The jury was subsequently instructed that the statements attributed to the defendant by the prosecution could only be considered in assessing the defendant's credibility and not as evidence of guilt.

The Supreme Court, quoting *Walder*, held that this use of the otherwise inadmissible evidence was proper. The Court also expanded the *Walder* rule in a significant respect, stating:

> "It is true that Walder was impeached as to collateral matters included in his direct examination, whereas petitioner here was impeached as to testimony bearing more directly on the crimes charged. We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder*. Petitioner's testimony in his own behalf concerning the events of January 7 contrasted sharply with what he told the police shortly after his arrest. The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the

benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." 401 U.S. at 225, 28 L. Ed. 2d at 4, 91 S. Ct. at 645.

See also *Oregon v. Hass* (1975), 420 U.S. 714, 43 L. Ed. 2d 570, 95 S. Ct. 1215.

These principles were reiterated, and the rule was further expanded in *United States v. Havens* (1980), 446 U.S. 620, 64 L. Ed. 2d 559, 100 S. Ct. 1912. In that case, Havens and a companion, John McLeroth, were arrested after airport customs officers found cocaine sewed into makeshift pockets in a T-shirt McLeroth was wearing. A warrantless search of Havens' luggage produced a T-shirt from which pieces had been cut that matched the pockets in McLeroth's T-shirt. The fruits of the search of Havens' luggage, including the cut-up T-shirt, were suppressed prior to trial, 446 U.S. at 621-22, 64 L. Ed. 2d at 562, 100 S. Ct. at 1914.

McLeroth pleaded guilty and testified against Havens. His testimony included an assertion that Havens had supplied him with the altered T-shirt and had sewn the pockets shut. Havens took the stand in his own defense and, on direct examination, denied involvement in the offense and also denied knowing that McLeroth had anything "taped or draped around his body." 446 U.S. at 622, 64 L. Ed. 2d at 563, 100 S. Ct. at 1914.

On cross-examination, Havens was questioned specifically about his involvement in "sewing of the cotton swatches to make pockets on [the] tee shirt." (446 U.S. at 623, 64 L. Ed. 2d at 563, 100 S. Ct. at 1914.) He again denied involvement. He was then asked whether when he came through customs he had the suppressed T-

shirt in his luggage. After defense counsel's objection was overruled, Havens denied possession of the T-shirt. Subsequently, on rebuttal, a government agent testified that the T-shirt had been found in Havens' luggage, and the T-shirt was admitted into evidence. The jury was instructed that this rebuttal evidence was to be considered only for impeaching Havens' credibility. 446 U.S. at 623, 64 L. Ed. 2d at 563, 100 S. Ct. at 1914.

The Supreme Court upheld this use of the evidence. In so doing, it enlarged the impeachment exception in an important respect. In prior cases such as *Walder* and *Harris*, the statements sought to be impeached were elicited on direct examination. In *Havens*, the specific "T-shirt testimony" which was impeached by admission of the illegally seized evidence was brought out on cross-examination by the government. This fact, while not directly applicable to the case before us, nonetheless indicates the Court's increasing unwillingness to condone the misuse of the exclusionary rule as a shield for purposeful perjury. The Court stated:

"We also think that the policies of the exclusionary rule no more bar impeachment here than they did in *Walder*, *Harris*, and *Hass*. In those cases, the ends of the exclusionary rules were thought adequately implemented by denying the government the use of the challenged evidence to make out its case in chief. The incremental furthering of those ends by forbidding impeachment of the defendant who testifies was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial. We reaffirm this assessment of the competing interests, and hold that a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence

that has been illegally obtained and that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." 446 U.S. at 627-28, 64 L. Ed. 2d at 566, 100 S. Ct. at 1916-17.

The principles emerging from this line of cases were recently applied by this court in *People v. Payne* (1983), 98 Ill. 2d 45. There, the fruits of a search of the defendant's apartment had been suppressed. During cross-examination of one of the arresting officers, the defense counsel asked whether the defendant's apartment had been searched. After the officer responded affirmatively, defense counsel concluded his questioning, thus leaving the jury with the false impression that the search had been fruitless. The trial court permitted the introduction of the suppressed evidence to correct this impression on the ground that the defense's misleading cross-examination opened the door to its admission. 98 Ill. 2d at 49-50.

This court upheld that ruling, stating, "'[i]f a defendant procures, invites or acquiesces in the admission of evidence, even though it be improper, he cannot complain.'" (98 Ill. 2d at 50, quoting *People v. Burage* (1961), 23 Ill. 2d 280, 283, *cert. denied* (1962), 369 U.S. 808, 7 L. Ed. 2d 555, 82 S. Ct. 651.) This court went on to state:

> "'There is no gainsaying that arriving at the truth is a fundamental goal of our legal system' (*United States v. Havens* (1980), 446 U.S. 620, 626, 64 L. Ed. 2d 559, 565, 100 S. Ct. 1912, 1916), and we consider that allowing the defense or prosecution to misrepresent to the jury the actual facts of the case is neither consistent with the proper functioning and continued integrity of the judicial system nor with the policies of the exclusionary rules. (See *Havens; Walder v. United States* (1954), 347 U.S. 62, 98 L. Ed. 503, 74 S. Ct. 354.)" 98 Ill. 2d at 51-52.

As the above discussion demonstrates, both the Supreme Court precedent and our own prior cases exhibit strong disapproval of these attempts to abuse the exclusionary rule. The laudable purposes of the rule notwithstanding, it does not follow that defendants may transform it into a shield for knowing perjury or intentional misrepresentation.

The defendant argues, however, that *Walder*, *Harris*, *Hass* and *Havens* are distinguishable from this case in one decisive respect: in all those cases the defendant himself testified, and it was his own testimony which was impeached by admission of the previously suppressed evidence. According to this view, when a defendant elects to take the stand and testify in a manner inconsistent with suppressed evidence, he thereby "waives" his right to have the impeaching material excluded. Thus, the argument runs, if the defendant does not testify no such "waiver" occurs and the evidence must remain excluded, even if other defense witnesses testify falsely.

We do not accept these contentions. While it is true as a factual matter that the defendants in *Walder*, *Harris* and *Havens* all testified and were themselves impeached, even a cursory reading of those cases reveals that they do not turn on a "waiver" theory, although the waiver theory has been advanced as one explanation for the developing limitations on the exclusionary rule. (See 4 W. LaFave, Search & Seizure, at 488 (2d ed. 1987).) Rather, the animating principle behind all those cases was a balancing between the goals of the exclusionary rule and the importance of arriving at the truth in criminal trials. In striking that balance, the Court "rejected the notion that the defendant's constitutional shield against having illegally seized evidence used against him could be 'perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.'" *Havens*, 446 U.S. at

626, 64 L. Ed. 2d at 565, 100 S. Ct. at 1916, quoting *Harris*, 401 U.S. at 226, 28 L. Ed. 2d at 5, 91 S. Ct. at 646.

In our view, if a defendant is prohibited from using perjury by way of a defense, it matters not from whose lips that perjury comes. Just as a defendant may not directly perjure himself and then hide behind the exclusionary rule, he also cannot be allowed to use perjurious testimony through a biased defense witness, in this case the principal defense witness, without affording the prosecution an opportunity to challenge the veracity of that testimony. We therefore conclude that admission of the evidence was not inconsistent with the reasoning of the cases discussed above.

Defendant further argues that expansion of admissibility in this manner would seriously erode the protections of the exclusionary rule. He asserts that such a holding will enable police and prosecutors to willfully disregard constitutional rights when obtaining evidence in the knowledge that such evidence will be admissible to contradict defense witnesses. We do not agree with this contention. If this exception to the exclusionary rule is limited to the use of the suppressed evidence to rebut statements made by a defense witness on direct examination and not to rebut statements elicited on cross-examination, there is little likelihood that the police would plan to disregard constitutional rights to obtain a statement from the defendant on the slight chance that a witness for the defense would commit perjury on direct examination. See 4 W. LaFave, Search & Seizure, at 488 (2d ed. 1987).

The argument that the floodgates will be opened to admission of illegally seized evidence in countless cases assumes that defense witnesses commonly resort to perjury. We point out that this case defines a very narrow area in which the exception to the exclusionary rule may operate. The statement of the witness sought to be re-

butted by the suppressed evidence must not be elicited through cross-examination by the prosecutor, but must be an assertion by a defense witness elicited on direct examination which is directly contrary to an assertion made by the defendant in the suppressed statements. The difference between the assertion by the defense witness and that contained in the suppressed statement must be more than a mere inconsistency. The difference must amount to a contradiction to the extent that the statement of the witnesses cannot be true when measured against the suppressed statement of the defendant. Also, it must be apparent that the untrue statement of the witness, as so measured, has been purposely presented by the defendant. Furthermore, any part of a suppressed statement of the defendant which can be characterized as a confession must not be used for the purpose of rebutting the testimony of a defense witness. The holding in *Walder* that the defendant must be free to deny all of the elements of the case against him without thereby giving leave to the government to introduce, by way of rebuttal, illegal evidence secured by it must be scrupulously observed in applying the rule we announce today.

In our view, this rule strikes the proper balance between the right of defendants to be protected against unconstitutional searches and seizures and the fact-finding goals of criminal trials. The deterrent ends of the exclusionary rule are served by denying the prosecution the use of the evidence in making its case in chief. So long as the defendant and his witnesses testify truthfully and refrain from testifying in a manner inconsistent with that evidence, the defendant retains the benefits of suppression. However, just as the prosecution may not make its case with suppressed evidence neither can the defendant affirmatively exploit the fact of suppression in fashioning his defense.

To summarize, we hold that when a defense witness testifies on direct examination in a manner squarely at

odds with evidence which has been suppressed, that evidence may be introduced to challenge the veracity of the testimony. That said, we emphasize that this rule should be carefully applied to avoid enlargement of the exception to the point of swallowing the exclusionary rule. As previously noted, only statements made on *direct* examination may be impeached and there must be a direct, material relationship between the trial testimony and the impeaching evidence. We recognize that the term "impeach" is loosely used in this context. Although the use of prior inconsistent statements for impeachment is ordinarily considered in connection with prior statements by the witness sought to be impeached, impeachment may also be accomplished by the use of a prior contradictory statement by another. Although such contradictory statements by others are often held inadmissible as being irrelevant as collateral to the main proceeding, such a contradictory statement of another may be used to prove untrue some fact recited by a witness as true which, if he were really there and saw what he claims to have seen, he could not have been mistaken. "So we may recognize this * * * type of allowable contradiction, namely, the contradiction of any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true." McCormick, Handbook of the Law of Evidence § 47, at 99 (2d ed. 1972).

The defendant's next contention is that even if the suppressed statement were properly admitted, error resulted when the trial court refused a limiting instruction proposed by the defendant, and when the prosecution was permitted to argue the evidence "substantively" against the defendant. We hold, however, that any error in this regard was harmless.

After the defendant's suppressed statements were introduced into evidence, defense counsel requested that

the jury be given a limiting instruction regarding the use of the statements. The trial judge, at that time, instructed the jury as follows:

> "It's offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red."

Defense counsel did not object to this instruction and did not ask that it be altered in any way.

Subsequently, during the conference on instructions, defense counsel proposed the following instruction:

> "Evidence that the defendant made statements following his arrest may be considered by you only as it may affect the believability of Jewel Henderson. It may not be considered by you as evidence of the commission of any of the crimes charged."

Later, the defendant offered a modified version of this instruction in which the word "witnesses" was substituted for the name "Jewel Henderson." The trial court refused to give either version, but did give the following pattern instruction:

> "The believability of a witness may be challenged by evidence that on some former occasion the witness made a statement that was not consistent with his testimony in this case and evidence of this kind may be considered by you only for the purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom." Illinois Pattern Jury Instructions, Criminal, No. 3.11 (2d ed. 1981).

The instruction given does not fit the situation in this case, because the instruction refers to a prior statement

by a witness which contradicts the evidence given by that witness at trial. It does, however, state the purpose for which such contradicting evidence may be used and specifies that the prior contradicting statement may be considered only for the purpose of deciding the weight to be given to the testimony given in court. In considering whether the court committed reversible error in refusing the two instructions tendered by the defendant, we must consider not only the pattern instruction on inconsistent statements, which the court gave, but also the oral instruction given by the court following the introduction of the evidence in question, which informed the jury that this evidence was to be considered for impeachment purposes. We find that the jury was informed of the limited use of this evidence. Any error or irregularity in the oral instruction given following the introduction of the evidence was waived by the defendant's failure to object or to request further instruction.

During rebuttal argument, the prosecution made the following statement:

> "This case comes to you with five eyewitnesses, and admission that he changed his color—changed the color of his hair."

An objection to this statement was overruled. The defendant now argues that this statement amounts to "substantive" use of the evidence in violation of the limited purpose for which it was admitted.

We disagree. Control of closing argument is largely left to the discretion of the trial court and every presumption must be indulged in that the court has properly exercised that discretion. (*People v. Smothers* (1973), 55 Ill. 2d 172). Moreover, the reference to the defendant's statement was made on rebuttal argument, after defense counsel had argued as to the reasons Jewel Henderson would not lie for defendant. In that context, the reference was relevant to the issue of Ms. Henderson's truthfulness and was not a wholly unwarranted line of argument. Moreover, the statement quoted was little more than a passing reference. The defendant's statement was not dwelled upon or made the focus of the argument. The jury was instructed as to the purpose for which defendant's statement could be used. In light of the other strong evidence of defendant's guilt, we hold that any error resulting from this brief reference was harmless.

For all the above reasons, the judgment of the appellate court is reversed, and the judgment of the circuit court is affirmed.

Appellate court reversed;
circuit court affirmed.

JUSTICE WARD, dissenting:

The reason for the majority's holding is seductively presented; to prevent an accused from manipulating the exclusionary rule in such a way as to permit the use of perjury in his defense. A basic and, I consider, an invincible problem with the holding, however, is that it permits the impeachment of a witness' credibility on the ground of an inconsistent statement, not made by the witness himself, but by another person and, further, that the impeaching would be by means of illegally procured evidence that had been suppressed in the very case. Justice Clark in his dissent cites decisions that hold such evidence cannot be used to impeach the testimony of anyone other than the defendant upon whose motion the evidence was suppressed. This is only sensible; to hold otherwise would be to contradict the nature of impeachment. McCormick, Evidence § 33 (3d ed. 1984).

Too, the trial court compounded its error of permitting impeachment of the witness by the contrary and suppressed statement of the defendant. The judge instructed the jury at that time that:

"It's offered for the purpose of impeaching [*sic*] the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red."

The jury thus was told that the suppressed evidence was being admitted and being used as substantive evidence to contradict the testimony of the witness. Deeper confusion resulted when the trial court formally gave Illinois Pattern Jury Instruction, Criminal, No. 3.11 (2d ed. 1981), which is set out in the majority opinion. Considering what had occurred the instruction was irrelevant. It did not, as the majority opinion states, "fit the situation in this case." Slip op. at 13.

The trial court continued to confuse impeachment with rebuttal and, as the appellate court opinion noted, permitted the prosecution in final argument to make use of suppressed evidence substantively in rebuttal. (McCormick, Evidence § 33 (3d ed. 1984).) The majority responds to the complaint that the court permitted this use of the suppressed evidence by commenting that control of closing argument is within the discretion of the trial court and that it will be presumed that the discretion was properly exercised. As an abstract proposition, that is undeniable, but it is obvious that it does not answer the complaint that the suppressed evidence was used in rebuttal. We cannot innocently indulge the presumption that the court properly exercised discretion when the record shows error in its exercise. Another aspect of the majority's view with which I cannot agree is that it appears to gratuitously and with finality assume that a witness' testimony will be perjurious or at least erroneous. To illustrate, the opinion contains statements such as: "Also, it must be apparent that the untrue statement of the witness * * *" (slip op. at 11) and "So long as the defendant and his witnesses testify truthfully and refrain

from testifying in a manner inconsistent with that evidence, the defendant retains the benefits of suppression" (slip op. at 11). The majority does not consider that there simply might be differing impressions or recollections by the defendant and the witness.

For these reasons, I must respectfully dissent.

JUSTICE STAMOS joins in this dissent.

JUSTICE CLARK, also dissenting:

Because I cannot acquiesce in this judicial repeal of the fourth amendment, I strongly and categorically dissent.

The majority reaches out to achieve a result which is at best suggested, and hardly compelled, by the Supreme Court's case law and by our own. In fact, the few cases directly on point, which the majority does not cite or distinguish, clearly hold that suppressed evidence cannot be admitted to "impeach" or rebut the testimony of any witness other than the defendant himself. (See *United States v. Hinckley* (D.C. Cir. 1982), 672 F.2d 115; *State v. Burnett* (Mo. 1982), 637 S.W.2d 680 (*en banc*); *People v. Walls* (1973), 42 A.D.2d 575, 344 N.Y.S.2d 435; *State v. Kilborn* (1983), 143 Vt. 360, 466 A.2d 1175; *State v. Hubbard* (1985), 103 Wash. 2d 570, 693 P.2d 718; see also 4 W. LaFave, Search & Seizure § 11.6(a), at 495-96 (2d ed. 1987).) The majority's contrary decision is, for several reasons, simply mistaken.

First, the majority relies upon a reading of the applicable case law which is, to say the least, extremely tendentious. It is well-settled that under the fourth amendment exclusionary rule evidence obtained in violation of the amendment must be suppressed and may not be introduced at trial. (*Wong Sun v. United States* (1963), 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407; *Nardone v. United States* (1939), 308 U.S. 338, 84 L. Ed. 307, 60 S. Ct. 266; *Silverthorne Lumber Co. v. United States*

(1920), 251 U.S. 385, 64 L. Ed. 319, 40 S. Ct. 182.) In other words, the prosecution may not use illegally obtained evidence as substantive evidence of the defendant's guilt. Nor is this restriction limited to the prosecution's case in chief:

> "[The] Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." (*Walder v. United States* (1954), 347 U.S. 62, 65, 98 L. Ed. 503, 507, 74 S. Ct. 354, 356.)

Any other rule would unduly encourage law enforcement authorities to violate the fourth amendment routinely so as to garner evidence which could be held in reserve, thereby inhibiting the accused from presenting evidence in his own defense.

There are some situations in which illegally obtained evidence may be used. Outside of the trial context, such evidence may be used, for example, to locate witnesses identified by the evidence (*Michigan v. Tucker* (1974), 417 U.S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357) or to question witnesses during grand jury proceedings (*United States v. Calandra* (1974), 414 U.S. 338, 38 L. Ed. 2d 561, 94 S. Ct. 613). Under the Federal Constitution, illegally obtained evidence may also be used as substantive evidence of the defendant's guilt so long as it is the product of a facially valid warrant executed by law enforcement authorities acting in good faith. (*United States v. Leon* (1984), 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405.) Of course, none of these exceptions are pertinent to this case. The only two exceptions which might even arguably apply are the use of illegally obtained evidence to either (1) impeach a defendant's credibility either on cross-examination or direct (*United States v. Havens* (1980), 446 U.S. 620, 64 L. Ed. 2d 559, 100 S. Ct. 1912; *Oregon v. Hass* (1975), 420 U.S. 714, 43 L. Ed. 2d 570, 95 S. Ct. 1215; *Harris v. New York* (1971), 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643; 4 W. LaFave, Search & Seizure § 11.6(a) (2d ed. 1987) see also *Walder v. United States* (1954), 347 U.S. 62, 98 L. Ed. 503, 74 S. Ct. 354) or to (2) respond to defense tactics which seek to take extraordinary advantage of the fact of suppression and thereby "open the door" to the admission of the suppressed evidence (*Walder v. United States* (1954), 347 U.S. 62, 65, 98 L. Ed. 2d 503, 507, 74 S. Ct. 354, 356; *United States ex rel. Castillo v. Fay* (2d Cir. 1965), 350 F.2d 400; *People v. Payne* (1983), 98 Ill. 2d 45; *Commonwealth v. Wright* (1975), 234 Pa. Super. 83, 339 A.2d 103; 4 W. LaFave, Search & Seizure § 11.6(b) (2d ed. 1987)). The majority's opinion confuses these two distinct exceptions and thereby creates a rationale for the admission of illegally garnered evidence far broader than any actually contained in these cases.

As to the first, or impeachment, exception, the majority ignores the language in the Supreme Court cases clearly limiting it to the defendant who testifies. For example, the *Havens* Court, commenting on its earlier cases of *Harris* and *Hass*, noted:

> "In both cases, the Court stressed the importance of arriving at the truth in criminal trials, as well as the *defendant's* obligation to speak the truth in response to proper questions. We rejected the notion that the *defendant's* constitutional shield against having illegally seized evidence used against him could be 'perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.' • • •
>
> • • • We have repeatedly insisted that when *defendants* testify, they must testify truthfully or suf-

fer the consequences." (Emphasis added.) *Havens*, 446 U.S. at 626, 64 L. Ed. 2d at 565-66, 100 S. Ct. at 1916.

Not a line of *Harris* or *Havens* suggests that their holdings are intended to apply to witnesses other than the defendant.

Moreover, it is clear that both *Harris* and *Havens* are premised at least partially upon a waiver theory utterly inapplicable to witnesses other than the defendant. "Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." (*Harris*, 401 U.S. at 225, 28 L. Ed. at 4, 91 S. Ct. at 645-46.) The interpretation of *Harris* as an example of waiver is not, as the majority seems to suggest, merely a commentator's theory or the defendant's own invention. In *State v. Burnett* (Mo. 1982), 637 S.W.2d 680, the Missouri Supreme Court adopted the same interpretation:

> "In each of the United States Supreme Court cases, including *Havens*, the Court recognized that the defendant's right not to have illegally seized evidence used against him, but found a waiver of that right when and if the defendant testified in his own defense in the manner set forth in those cases. It was the defendant who was not to be allowed the benefit of the exclusionary rule so as to permit him to freely commit perjury. This constituted a waiver as to rebuttal evidence directly contradicting the defendant's testimony.
>
> In the instant case, the defendant did not testify and, therefore, cannot be held to have waived his Fourth Amendment rights with respect to the suppressed evidence so as to permit its introduction as impeachment of his direct testimony. There was no testimony of the defendant to impeach."

Waiver, of course, does not apply to a witness who may testify voluntarily or under process, may or may not be telling the truth, and is in any case no mere surrogate for the defendant. We are long past the days when a party was held to "vouch for" his witness and to be bound by what his witness said. Moreover, the majority's contention that Jewell Henderson perjured herself is speculation, unsupported by anything in the record.

A second distinction between this case and the impeachment cases is that those cases involved impeachment, "a traditional truth-testing device of the adversary process," whose value outweighed the benefits of the exclusionary rule in that particular instance. But, as the majority's use of quotation marks around the word "impeachment" suggests, the use of the defendant's statement to rebut Jewel Henderson's testimony is not impeachment as traditionally understood. In usual practice, a witness may be impeached by reference to his *own* prior inconsistent statements. I have yet to hear of a case in which a witness was impeached by the use of *someone else's* prior inconsistent statements. If I testify to something at trial, the fact that I previously said something else may tend to prove that I am lying. But the fact that someone else has previously said something inconsistent proves nothing at all.

For this reason, the trial court's instruction to the jury that "evidence that the defendant made statements following his arrest may be considered by you only as it may affect the believability of Jewel Henderson" made no sense. Under traditional rules of evidence, the defendant's statement could have come in as a prior inconsistent statement if he testified, or as a party-admission, even if he did not. In the first case it would have constituted impeachment, and in the second case, substantive evidence. But its use to "impeach" the testimony of another witness is wholly unprecedented—and flows solely from the attempts to shoehorn the facts of

this case into the narrow confines of *Harris* and *Havens*. It is therefore not surprising that the prosecution, the defense counsel, and the court all stumbled so badly over the question of instructing the jury. The only pattern jury instruction available clearly referred to the witnesses' prior inconsistent statements, not the defendant's.

It is true that a witness may sometimes be impeached by extrinsic facts if the facts are not collateral. Noncollateral facts include "facts relevant to substantive issues in the case," "facts which are independently provable by extrinsic evidence to impeach or disqualify the witness," (*e.g.*, bias, interest, conviction of crime, etc.) and, lastly, ordinarily collateral facts which are so vital to the witnesses' story that proof of them will tend to disprove it: "the contradiction of any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true." (McCormick, Evidence § 47, at 99 (2d ed. 1972).) McCormick nowhere suggests that extrinsic proof as to any of these three types of facts can include the prior contradictory statement of someone other than the witness. None of McCormick's examples of the third type of exception involve statements of another witness: See, *e.g.*, *East Tennessee V. & G. Ry. Co. v. Daniel* (1893), 91 Ga. 768, 18 S.E. 22 (witness who claimed to see incident while stopping to buy tobacco impeached by testimony of storekeeper that he did not stop to buy tobacco); *Stephens v. People* (1859), 19 N.Y. 549, 572 (witness who claimed that arsenic was kept to kill rats in cellar where provisions were kept impeached by witness who testified that no provisions were kept in cellar); *Commonwealth v. Jackson* (Ky. 1955), 281 S.W.2d 891 (impeachment by inconsistent statement of *witness*). I have yet to find a case where a defense witness was impeached by evidence of the defendant's statements.

Of course, the real crux of the matter is the exclusionary rule, not evidence law. But the confusion about impeachment points up the confusion in the majority's opinion. The color of the defendant's hair was not a collateral issue—it was clearly material because it directly related to his identity and his guilt. Therefore the State was free to use extrinsic evidence to prove the color of his hair on the day in question. That is not really the question. The real question is whether the State can use suppressed evidence to prove that extrinsic fact. Normally such evidence could be admitted—both to impeach the witness and as substantive evidence, without any limiting instruction. But *Walder*, *Harris*, and *Havens* seem to limit the admission of suppressed evidence to impeachment—evidence admitted not as substantive proof of the defendant's guilt, but only as tending to prove that he is not telling the truth. This distinction, while obviously fragile, would be completely destroyed by the majority's decision.

In fact, although the majority's opinion is not clear on this point, admission of the defendant' statement makes sense not as impeachment but as *rebuttal*, substantive evidence introduced to contradict a specific point in the defendant's evidence. In other words, what the majority really means is that a defendant who puts on a defense thereby waives his fourth amendment right to the exclusion of suppressed evidence which contradicts his defense. While I will deal with the merits of this position below—and its impact on the exclusionary rule—I would note here only that it is far removed from the narrow impeachment exception recognized in *Harris* and *Havens*.

The second possible exception to the exclusionary rule, the "opening the door" exception, is also inapplicable. A defendant does not open the door to the admission of suppressed evidence merely by mounting a defense. Instead, he must engage in "tactics which * * * seek to gain extraordinary advantage from the *fact of suppression*."

(Emphasis added.) (4 W. LaFave, Search & Seizure § 11.6(b), at 497 (2d ed. 1987).) One typical tactic, for example, is to affirmatively assert the nonexistence of the suppressed evidence, or to berate the prosecution for failing to produce it. For example, in our own case of *People v. Payne* (1983), 98 Ill. 2d 45, 49-50, defense counsel, through cross-examination, gave the misleading impression that a search of the defendant's apartment had been fruitless. (See also *Walder v. United States* (1954), 347 U.S. 62, 65, 98 L. Ed. 503, 507, 74 S. Ct. 354, 356 (defendant made sweeping assertion that he had never in his life possessed drugs); *United States ex rel. Castillo v. Fay* (2d Cir. 1965), 350 F.2d 400 (defense counsel gave misleading impression on cross-examination by eliciting response that no narcotics had been found during search; State allowed to rebut with evidence of narcotics paraphernalia); *Commonwealth v. Wright* (1975), 234 Pa. Super. 83, 339 A.2d 103 (defense counsel created confussion during cross-examination as to whether admitted packet of heroin had ever been chemically analyzed, confusion which could only be alleviated by reference to nine other packets which had been suppressed).) In this case, if defense counsel argued that his client was innocent because he had not while in police custody made any statements, I would have not hesitated to hold that he had "opened the door" to at least a limited admission of the fact that defendant had made certain statements. But if merely presenting a witness whose testimony contradicts suppressed evidence "opens the door" to its admission, then the fourth amendment has only a very limited meaning. This I cannot accept.

Even were the majority's use of the pertinent case law less questionable and more accurate, I would still be deeply troubled by its treatment of, and attitude towards, the fourth amendment exclusionary rule. The rule is not some legal nicety invented to bedevil hapless prosecutors and policemen. It is our only bulwark against the most

common and hurtful abuses of governmental power. It expresses the long-held view that:

> "The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution, at 49 (1937).

After today's decision, a police officer deciding whether to "cross the threshold of the ruined tenement" in violation of the law will know that anything he finds there can be used as substantive evidence of the defendant's guilt so long as the defendant presents any evidence in his own defense. That knowledge can only weaken his incentive to obey the law.

In response, the majority argues that the effect of its decision will not, after all, be very great, since few defendants will actually present "perjured" testimony. Leaving aside the question of how we are to determine whether testimony is in fact perjurious, this argument is premised upon a profound misunderstanding of the purpose of the exclusionary rule. Preventing the admission of reliable evidence which tends to prove the guilt of the defendant is not its ultimate purpose, although that is its immediate effect. The ultimate purpose of the rule is to deter improper police conduct. (*Dunaway v. New York* (1979), 442 U.S. 200, 217-18, 60 L. Ed. 2d 824, 839, 99 S. Ct. 2248, 2259; *People v. White* (1987), 117 Ill. 2d 194, 226; *People v. Gabbard* (1979), 78 Ill. 2d 88, 98-99.) The principal beneficiaries of the rule's deterrent effect are not the criminals in whose cases the rule is applied but society at large: "all those citizens who never break laws more serious than those prohibiting overtime parking" (Dworkin, *Fact Style Adjudication & the Fourth*

Amendment: The Limits of Lawyering, 48 Ind. L.J. 329, 330-31 (1973)) but are nevertheless protected from illegal searches and seizures.

Therefore, the number of defendants who will present perjured testimony and so suffer the admission of illegally obtained rebuttal evidence is simply irrelevant. Law enforcement officials contemplating illegal activity have no way of knowing in advance whether the persons subjected to that activity will eventually attempt to present a defense inconsistent with the evidence the officers may garner, and if so whether their illegally obtained evidence may be useful for rebuttal. Whether the number of admissions is few or many, the knowledge that the evidence may eventually prove useful—either to deter a defendant from presenting inconsistent evidence or to rebut evidence actually presented—cannot help but influence police behavior.

It is true that this effect will be limited by the inability of the State to use illegally obtained evidence on its case in chief. Where law enforcement authorities know in advance that the only evidence against a potential defendant can only be obtained through unlawful means they may hesitate. But in any case in which the police officers can, through lawful means, acquire enough evidence to make out a case against a suspect, they will be strongly tempted to secure additional evidence illegally.

I would not argue that we will face an epidemic outbreak of police illegality overnight. Our law enforcement authorities have lived with the exclusionary rule for over 60 years. Habit, custom, and residual respect for the law will doubtless prevent any sudden increase in the number of illegal searches and seizures. But eventually the more ambitious and aggressive policemen and prosecutors, engaged as they are in the highly competitive business of ferreting out crime, will discover a handy new tool in their arsenal. I am not so sanguine about

human nature as to believe that they will all be scrupulous enough not to use it.

We are all members of a court which adopted the exclusionary rule decades before it was applied to the States. (*People v. Brocamp* (1923), 307 Ill. 448.) With this case we take a significant step towards its weakening and eventual disintegration. Since I cannot agree with this view, I dissent, and would affirm the undivided holding of the appellate court.

JUSTICE STAMOS joins in this dissent.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 3, 1988

State Appellate Defender Chicago
First Judicial District
100 W. Randolph St., S#5-500
Chicago, IL 60601

No. 65049—People State of Illinois, appellant, v. Darryl James, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on October 13, 1988.

SUPREME COURT OF THE UNITED STATES

No. 88-6075

DARRYL JAMES,
Petitioner

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 21, 1989

Supreme Court, U.S.
FILED
MAY 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-6075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DARRYL JAMES,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR THE PETITIONER

THEODORE A. GOTTFRIED
Appellate Defender
MICHAEL J. PELLETIER
Deputy Defender
MARTIN S. CARLSON*
PATRICIA UNBINN
Assistant Appellate Defenders
Office of the State Appellate Defender
State of Illinois Center
100 West Randolph Street
Suite 5-500
Chicago, Illinois 60601
(312) 917-5472

Counsel of Record

PRESS OF BAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

Whether statements of a defendant which have been suppressed as the fruit of an unlawful arrest without probable cause can be used to rebut the testimony of a defense witness.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. CONTRARY TO THE DECISIONS OF THIS COURT, THE ADMISSION OF PETITIONER'S SUPPRESSED STATEMENTS TO REBUT THE TESTIMONY OF A WITNESS CALLED IN HIS DEFENSE ALLOWED THE STATE TO USE THIS ILLEGALLY OBTAINED EVIDENCE AS SUBSTANTIVE PROOF OF GUILT	12
II. AFFIRMANCE OF THE DECISION BELOW WOULD UNDERMINE THE DETERRENT FUNCTION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE BY PROVIDING THE POLICE WITH A SIGNIFICANT INCENTIVE TO MAKE ARRESTS FOR QUESTIONING IN THE ABSENCE OF PROBABLE CAUSE	16
CONCLUSION	21

TABLE OF AUTHORITIES

Cases	Page
Berkemer v. *McCarty*, 468 U.S. 420 (1984)	12
Brown v. *Illinois*, 422 U.S. 590 (1975)	16
Elkins v. *United States*, 364 U.S. 206 (1960)	16
Harris v. *New York*, 401 U.S. 222 (1971)	*passim*
Hendrickson v. *State*, 290 Ark. 319, 719 S.W.2d 420 (1986)	20
Illinois v. *Krull*, 480 U.S. 340 (1987)	16
Miranda v. *Arizona*, 384 U.S. 436 (1966)	11
Oregon v. *Hass*, 420 U.S. 714 (1975)	*passim*
People v. *James*, 123 Ill.2d 523, 528 N.E.2d 723 (1988)	*passim*
People v. *Ricco*, 56 N.Y.2d 320, 437 N.E.2d 1097 (1982)	20
People v. *Walls*, 42 A.D.2d 575, 344 N.Y.S.2d 435 (App.Div. 1973)	20
Richardson v. *Marsh*, 481 U.S. 200 (1987)	12
State v. *Burnett*, 637 S.W.2d 680 (Mo. 1982)	20
State v. *Hubbard*, 103 Wash.2d 570, 693 P.2d 718 (1985)	20
United States v. *Havens*, 446 U.S. 620 (1980)	*passim*
United States v. *Hinckley*, 672 F.2d 115 (D.C. Cir. 1982)	20
United States v. *Leon*, 468 U.S. 897 (1984)	16
Walder v. *United States*, 347 U.S. 62 (1954)	*passim*

MISCELLANEOUS

3A J. Wigmore, Evidence § 1000 (Chadbourn rev. 1970)	13
3A J. Wigmore, Evidence § 1018 (Chadbourn rev. 1970)	13

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (J.A. 24-53) is reported at 123 Ill.2d 523, 528 N.E.2d 723. The opinion of the Appellate Court of Illinois, First District, (J.A. 17-23) is reported at 153 Ill.App.3d 131, 505 N.E.2d 1118.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on July 20, 1988. A petition for rehearing was denied on October 3, 1988. (J.A. 54) The petition for a writ of certiorari was filed on December 2, 1988, and was granted on February 21, 1989. (J.A. 55) The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Following a jury trial, petitioner Darryl James was found guilty of the murder of Geliria Boyd and the attempted murder of Delbert Collins and was sentenced to concurrent terms of 30 and 15 years. These charges arose from a shooting which occurred at approximately 11:00 p.m. on August 30, 1982. (R. 254-255) A group of eight or nine teenagers, which included Boyd and Collins, was walking home from a party on the south side of Chicago. They were approached by three other teenagers, and the shortest of the three asked if anyone had any money. When Delbert Collins made a smart remark in reply, the short boy pulled a gun and fired several shots at Collins' group. (R. 294-295, 345-349, 407-410) Collins sustained a gunshot wound in the back, and Geliria Boyd was shot in the head and died as a result of this wound. (R. 382, 414-416)

On the night of August 31, 1982, between 8:00 and 8:30 p.m., Detectives Steven Glynn and Brian Regan of the Chicago Police Department took petitioner into custody after finding him at his mother's beauty parlor sitting under a hair dryer. After placing petitioner in their car they questioned him about the color of his hair the previous day, and petitioner responded that his hair had been reddish-brown, long and combed straight back. (J.A. 10, Supp.R. 93, 99-101, 120-121) The detectives questioned petitioner again at the police station at around 10:30 p.m. At that time petitioner reiterated that his hair had been reddish-brown and combed straight back on the evening of the shooting and also stated that he had gone to the beauty parlor to have his hair dyed black and curled to change his appearance. (J.A. 10-11; Supp.R. 94-95, 124-125) While at the police station petitioner also made statements concerning the shooting. (R. 514; Supp.R. 105-106, 110-112)

Petitioner was 15 years old at the time of his arrest but a juvenile court judge granted the State's motion to prosecute him as an adult. Prior to trial petitioner moved to suppress all statements and any other evidence obtained after he was taken into custody on the ground that his warrantless arrest was effected without probable cause. (R. 609-611) Following a hearing the trial court sustained this motion, finding that the police did not have probable cause to arrest petitioner. (R. 47-60)

At petitioner's trial the State called Delbert Collins and four other members of the group present at the shooting. All five witnesses were friends and called themselves the "B Boys," and all five identified petitioner in court as the boy who fired the shots. Each witness testified that petitioner had long reddish hair worn in a slicked back "butter style" on the night of the shooting, and four of them testified that he was wearing an earring. The same four witnesses also testified that they had seen petitioner a few weeks earlier at the Bud Billikin Parade and remembered him because of his red "butter" hair style and earring. (R. 296-302; 341-343, 352; 388, 391-392; 411-412; 430-431, 433) At trial petitioner's hair was black and was worn in a natural style. When they gave descriptions of the offenders to the police immediately after the shooting, none of the witnesses said anything about the hair color or style of the person who fired the shots, (R. 329, 365, 399, 448) but two of them testified that they did mention the red hair when they spoke to detectives later on at the police station. (R. 364, 402-403)

The final witness called by the State during its case-in-chief was Detective Glynn. He testified that on the night of August 31, 1982, during his investigation of the shooting, he and his partner went to a beauty parlor called Diane's House of Beauty. While there he spoke to Diane

James, petitioner's mother, and saw petitioner under a hair dryer in the beauty parlor. (R. 486-489)

The petitioner did not testify at trial but called two witnesses in his defense. The first of these witnesses was Jewel Henderson, who was a friend of petitioner and his family.[1] (J.A. 2-3) On direct examination she testified that on August 30, 1982, she took petitioner to the high school he had been attending to pick up his transcripts and to the high school to which he was transferring to register him. At that time his hair was black and he was not wearing an earring. (J.A. 3-4) She also testified that earlier that month she watched the Bud Billikin Parade with the petitioner from a window of his mother's beauty shop. (J.A. 4-5) Finally, Ms. Henderson testified that petitioner had a reputation in the neighborhood of being a non-violent person. (J.A. 6). On cross-examination, Ms. Henderson testified that she was at petitioner's house on the night of August 30, 1982, and that petitioner arrived home sometime between 10:00 and 11:00 p.m. She stated she couldn't be more specific about the time because she wasn't wearing a watch. (J.A. 7)

After Ms. Henderson was excused, the prosecutor contended that her testimony had established an alibi and that the State should be allowed to rebut this by introducing the statement petitioner made to the police concerning the shooting. (R. 514-515) Following a lengthy colloquy, the court found that no alibi had been established and denied the State's motion. (R. 515-542; Supp.R. 9-36, 50-62) Thereafter, the State sought to introduce

[1] The second defense witness was Detective Albert Jordan who testified concerning the account of the shooting and description of the offenders that he received from three of the State's witnesses. (Supp.R. 66-89)

petitioner's suppressed statements concerning the color of his hair to rebut Ms. Henderson's testimony that petitioner's hair was black on the day of the shooting. When the trial court ruled, over petitioner's Fourth Amendment objection, that the State could do so, defense counsel requested a hearing on the voluntariness of the statements. (Supp.R. 62-65) Following a hearing at which Detectives Glynn and Regan testified, the trial court found that the petitioner's statements were voluntary (Supp.R. 128) and overruled petitioner's renewed Fourth Amendment objection to the use of the statements. (Supp.R. 128-134) Defense counsel then requested that the jury be instructed that the petitioner's statements could be considered only insofar as they reflected on the believability of Ms. Henderson, and the judge said he would do so. (Supp.R. 134)

In rebuttal, Detective Glynn was recalled by the State and testified that he arrested petitioner on August 31, 1982, and spoke to him in a squad car. At that time petitioner stated that on the evening of August 30 his hair was reddish brown, was long, and was combed straight back. (J.A. 9-10) Later that night Glynn spoke to petitioner in an interview room at the police station. Over objection, Glynn testified that he again asked petitioner about the color of his hair and the reason he was at the beauty parlor, and petitioner said that his hair was reddish brown, long and combed straight back on the evening of the shooting, and that he had gone to the beauty parlor to have his hair dyed black and curled in order to change his appearance. (J.A. 10-11)

Following Detective Glynn's testimony, when defense counsel requested the judge to instruct the jury on the purpose for which this testimony was received, the court orally instructed the jury as follows:

> It's offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red.

(J.A. 12)

In surrebuttal, petitioner's aunt testified that she saw him on August 30 and August 31, 1982, that on both days his hair was black, and that she had never seen him with red hair. (Supp.R. 149-150) The petitioner's brother also testified that petitioner's hair was black on the day he was arrested, on the day before he was arrested, and on the day of the Bud Billikin Parade. (Supp.R. 153-154)

Prior to closing arguments, defense counsel submitted two alternative written instructions stating:

> Evidence that the defendant made statements following his arrest may be considered by you only as it may affect the believability of Jewel Henderson [of witnesses]. It may not be considered by you as evidence of the commission of any of the crimes charged.

(J.A. 13) The trial court refused both instructions (Supp.R. 159, 206-207) and instead gave a pattern jury instruction concerning the limited purpose for which a witness' own prior inconsistent statements could be considered. Illinois Pattern Jury Instruction, Criminal, No. 3.11 (2nd ed. 1981). (J.A. 16)

During the State's rebuttal closing argument, the prosecutor commented on the petitioner's suppressed statements as follows:

> PROSECUTOR: Now, as I said, everybody in this room has a conscience, even Darryl has a conscience; and Darryl's conscience got to him the night he told the police that he changed his hair color. That's why—

> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled. He may argue.
>
> PROSECUTOR: He did something terrible and had to do something about it. His conscience overcame him.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.
>
> PROSECUTOR: The same way that our consciences might overcome us and cause us to act in some way that we might not ordinarily act but for that conscience. That's what happened when he told the police that he changed his hair color.
>
> * * *
>
> PROSECUTOR: This case comes to you with five eyewitnesses, an admission that he changed his color —changed the color of his hair.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.

(J.A. 14)

On appeal the Illinois Appellate Court reversed petitioner's convictions and ordered a new trial, holding that the trial court erred in admitting petitioner's tainted statements to rebut the testimony of Jewel Henderson. The appellate court observed that the decisions of this Court permitting the use of illegally obtained evidence at trial were strictly limited to the impeachment of a defendant's testimony, *Walder* v. *United States*, 347 U.S. 62 (1954), *Harris* v. *New York*, 401 U.S. 222 (1971), *Oregon* v. *Hass*, 420 U.S. 714 (1975), *United States* v. *Havens*, 446 U.S. 620 (1980) (J.A. 20), and ruled that it would not create a further exception to the exclusionary rule allow-

ing use of tainted evidence to rebut the testimony of a defense witness. The court concluded that to do so

> . . . would provide little or no deterrence against further Fourth Amendment violations and the State would be able, under the guise of impeachment, to use any illegally obtained evidence relevant to the principal issues in the case.

(J.A. 22)

The appellate court also rejected the State's alternative argument that the error in admitting the petitioner's suppressed statements was harmless. In doing so the court noted that the trial court's oral instruction that this evidence was offered to refute and rebut Jewel Henderson's testimony in effect sanctioned the substantive use of this evidence; that defense counsel's request for a further limiting instruction was refused; and that the State was allowed to make substantive use of the suppressed statements during closing argument. (J.A. 22-23)

The Illinois Supreme Court, by a 4-to-3 vote, reversed the judgment of the appellate court, holding that the petitioner's tainted statements were properly admitted to rebut the testimony of the defense witness. (J.A. 24-53) The court acknowledged that because the petitioner did not testify, the exception to the exclusionary rule it announced went beyond that sanctioned in *Walder*, *Harris*, *Hass*, and *Havens*, but concluded that it was not inconsistent with those cases and would not seriously erode the protection of the exclusionary rule. (J.A. 35-37)

The court also rejected petitioner's contentions that the jury was not properly instructed on the limited purpose for which his statements could be considered and that the prosecution used these statements as substantive evidence during its closing argument. The court held that

the refusal of the limiting instruction tendered by defense counsel did not constitute reversible error because the jury was given the pattern instruction on the use of a witness' prior inconsistent statements. While acknowledging that this instruction did not "fit the situation in this case," the court concluded that when considered with the trial court's oral instruction, the jury was informed of the limited purpose for which it could consider this evidence, and that any error or irregularity in the oral instruction was waived by petitioner's failure to object or request further instruction. (J.A. 39-40)

With respect to the State's closing argument, the court discussed only the prosecutor's assertion that: "This case comes to you with five eyewitnesses, an admission that he changed the color—changed the color of his hair." (J.A. 40) Despite the absence of any reference by the prosecutor to Jewel Henderson's testimony, the court concluded that this comment was relevant to the issue of her truthfulness and was not "wholly unwarranted," and that because it was only a passing reference any error resulting from this remark was harmless. (J.A. 40-41) The court did not mention the other, more lengthy comment cited as error by petitioner in which the prosecutor argued that the reason petitioner told the police that he changed his hair color was that he did something terrible and his conscience overcame him. (J.A. 14) The court's failure to address this use of the suppressed statements as substantive evidence of guilt was one of the points raised in petitioner's request for rehearing.

SUMMARY OF ARGUMENT

1. The use of illegally obtained statements of a defendant to rebut the testimony of a defense witness is fundamentally different from the kind of impeachment

this Court has previously sanctioned. The Fourth and Fifth Amendment exclusionary rules pose no bar to the use of illegally obtained evidence to impeach the credibility of a defendant whose testimony at trial conflicts with that evidence. *Walder* v. *United States*, 347 U.S. 62 (1954); *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975); *United States* v. *Havens*, 446 U.S. 620 (1980). In such circumstances no substantive use is made of the impeaching evidence; the trier of fact merely decides whether the existence of the inconsistency discredits the witness.

Where a defense witness is impeached with the statement of a defendant, however, the impeaching evidence is used substantively. The trier of fact can find the witness to have been discredited only if it finds the contrary statement of the defendant to be true. The statement becomes affirmative proof of guilt just as if it had been introduced in the State's case-in-chief.

2. Extension of the impeachment exception to permit the testimony of a defense witness to be rebutted by the suppressed statement of a defendant would undermine the deterrent function of the exclusionary rule by increasing the incentive of the police to violate the Fourth Amendment. Removal of the restriction that use of tainted evidence be confined to impeachment of defendant's own testimony would increase the instances of availability of that evidence to the prosecution. The value of the evidence to the prosecution would increase as well because it could be used to affirmatively prove guilt, rather than merely to discredit the testimony of the defendant. So long as the police believe they have sufficient evidence to withstand a motion for directed finding or verdict, no incentive would exist to refrain from illegal conduct to obtain incriminating evidence.

ARGUMENT

The question presented by this case is whether statements obtained from petitioner in violation of his Fourth Amendment rights were admissible to impeach the inconsistent testimony of a witness called in his defense. In answering this question in the affirmative the Illinois Supreme Court, with three justices dissenting, relied upon the line of cases beginning with *Walder* v. *United States*, in which this Court held that the Fourth and Fifth Amendment exclusionary rules did not bar the use of illegally seized evidence, or statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), to impeach the credibility of a defendant whose testimony at trial conflicts with the illegally obtained evidence. *Walder* v. *United States*, 347 U.S. 62 (1954); *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975); *United States* v. *Havens*, 446 U.S. 620 (1980). The majority opinion acknowledged that because the tainted statements were not used to impeach testimony of the petitioner himself, the exception to the exclusionary rule it approved went beyond that sanctioned in the above decisions of this Court but concluded that this broader exception was not inconsistent with the reasoning of those decisions. (J.A. 28-36)

In reaching this conclusion the majority opinion overlooked the fact that the nature of the impeachment process involved in this case, where illegally obtained statements are used to rebut the testimony of a defense witness, is fundamentally different from the type of impeachment sanctioned by the decisions of this Court. Point I of this brief will show that the method of impeachment employed at petitioner's trial not only permitted but was based upon the use of his statements as substantive evidence of guilt in contravention of the holdings in this

Court's impeachment exception cases. In Point II it will be shown that the affirmance of the rule announced in this case would provide police officers with a significant incentive to make investigatory arrests, thereby undermining the deterrent function of the exclusionary rule.

I. CONTRARY TO THE DECISIONS OF THIS COURT, THE ADMISSION OF PETITIONER'S SUPPRESSED STATEMENTS TO REBUT THE TESTIMONY OF A WITNESS CALLED IN HIS DEFENSE ALLOWED THE STATE TO USE THIS ILLEGALLY OBTAINED EVIDENCE AS SUBSTANTIVE PROOF OF GUILT.

This Court has on four occasions upheld the introduction of illegally obtained evidence at trial for the limited purpose of impeaching a defendant's inconsistent testimony. *Walder* v. *United States*, 347 U.S. 62 (1954) (physical evidence seized during unlawful search); *Harris* v. *New York*, 401 U.S. 222 (1971) and *Oregon* v. *Hass*, 420 U.S. 714 (1975) (statements obtained in violation of *Miranda* rule); *United States* v. *Havens*, 446 U.S. 620 (1980) (physical evidence and statement that were the fruit of an illegal search). In each of these cases the Court made clear that the tainted evidence was admissible solely to challenge the defendant's credibility and could not be used as substantive evidence of guilt, observing in each case that the jury was carefully so instructed. *Walder*, 347 U.S. at 64-65; *Harris*, 401 U.S. at 223, 225-226; *Hass*, 420 U.S. at 717, 722; *Havens*, 446 U.S. at 623, 627-628. In subsequent decisions this Court has reemphasized that its sanctioning of the use of illegally obtained evidence for impeachment purposes was predicated on the assumption that jurors will follow their instructions and will not use such evidence as substantive proof of guilt. *Richardson* v. *Marsh*, 481 U.S. 200, 206-207 (1987); *Berkemer* v. *McCarty*, 468 U.S. 420, 429 n. 9 (1984).

While this assumption has validity where unconstitutionally obtained statements are used to impeach the defendant's own testimony as was the case in *Harris*, *Hass* and *Havens*, it is wholly inapplicable to the method of impeachment used at petitioner's trial. The former situation involves impeachment by self-contradiction. Under this method of impeachment it is the inconsistency alone that serves to discredit the witness; the impeaching statement is not used assertively and the trier of fact is not asked to choose between it and the contrary testimony at trial. 3A J. Wigmore, Evidence § 1018 (Chadbourn rev. 1970). Thus, with proper limiting instructions having been given, the impeachment process in *Harris*, *Hass* and *Havens* did not involve the use of the tainted statements as substantive evidence of guilt.[2]

In contrast, the method of impeachment employed at petitioner's trial by its very nature required that the jury use his suppressed statements as substantive evidence. This case involves impeachment by contradiction under which the aim is to discredit the witness' testimony by introducing other evidence to prove that the witness was in error on a particular point. 3A J. Wigmore, Evidence § 1000 (Chadbourn rev. 1970). Unlike impeachment by self-contradiction, in this type of impeachment, "It is not the contradiction, but the truth of the contradicting assertion as opposed to the first one, that constitutes the probative end." Wigmore, *supra* § 1000 at 957.

---

[2] In *Walder* v. *United States*, the impeaching evidence was not a statement but illegally seized heroin which was introduced to contradict Walder's testimony that he had never possessed narcotics. However, because the heroin had been seized two years earlier and was unrelated to the charges being tried, 347 U.S. at 62-64, the introduction of this evidence to impeach presented no risk that it would be used as evidence of guilt.

In this case the State's contradicting evidence was not the testimony of another witness, but the petitioner's suppressed statements, and Jewel Henderson's testimony concerning the color of petitioner's hair would be impeached only if the jury concluded that petitioner's contrary statements were true. In short, to be relevant at all for the purpose of impeachment in this context petitioner's tainted statements had to be used as substantive evidence of guilt, a use which is constitutionally impermissible under the decisions of this Court. *United States* v. *Havens*, 446 U.S. at 627-628.

The inherent impossibility of limiting the use of illegally obtained statements to a constitutionally permissible purpose when they are introduced to impeach a witness other than the defendant himself is demonstrated by the "limiting" instruction given by the court and the prosecution's closing arguments in this case. After the trial court ruled that the State could use petitioner's suppressed statements to impeach the testimony of Jewel Henderson, defense counsel attempted to mitigate the harm by asking for a limiting instruction on the purpose for which Detective Glynn's rebuttal testimony was received. In response to this request the trial court orally instructed the jury that:

> It's offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red.

(J.A. 12) This instruction informed the jury that petitioner's statements were introduced to impeach Ms. Henderson's testimony by proving that petitioner's hair was red. It accurately states the nature of impeachment by

contradiction and illustrates that this method of impeachment requires that the contradicting evidence be used substantively.

Finally, during its rebuttal closing argument the State abandoned any pretense that petitioner's tainted statements were to be used for any purpose other than as evidence of guilt:

> PROSECUTOR: Now, as I said, everybody in this room has a conscience, even Darryl has a conscience; and Darryl's conscience got to him the night he told the police that he changed his hair color. That's why—
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled. He may argue.
>
> PROSECUTOR: He did something terrible and had to do something about it. His conscience overcame him.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.
>
> PROSECUTOR: The same way that our consciences might overcome us and cause us to act in some way that we might not ordinarily act but for that conscience. That's what happened when he told the police that he changed his hair color.
>
> * * * *
>
> PROSECUTOR: This case comes to you with five eyewitnesses, an admission that he changed his color —changed the color of his hair.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.

(J.A. 14) In these remarks the prosecution went beyond using petitioner's statements for the improper purpose of

proof that his hair was red. The prosecutor also asserted that petitioner's statement that he had his hair dyed to change his appearance constituted evidence showing his consciousness of guilt. Thus the prosecutor did not use petitioner's statements for the limited purpose of impeachment but relied upon these illegally obtained statements as affirmative proof of guilt just as if they had been introduced as part of the State's case-in-chief.

II. AFFIRMANCE OF THE DECISION BELOW WOULD UNDERMINE THE DETERRENT FUNCTION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE BY PROVIDING THE POLICE WITH A SIGNIFICANT INCENTIVE TO MAKE ARRESTS FOR QUESTIONING IN THE ABSENCE OF PROBABLE CAUSE.

As the decisions of this Court have repeatedly stressed, the primary purpose of the exclusionary rule is to deter the police from violating the right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment. *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987); *Brown* v. *Illinois*, 422 U.S. 590, 601-603 (1975). In the oft-quoted language of *Elkins* v. *United States*, 364 U.S. 206 (1960):

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effective way—by removing the incentive to disregard it.

364 U.S. at 217. Thus, in deciding whether the rule should be applied in a particular context the Court has sought to determine whether admission of illegally obtained evidence would encourage violations of the Fourth Amendment and has weighed this likelihood against the costs of exclusion to the truth-seeking goal of our legal system. *Illinois* v. *Krull*, 480 U.S. at 347; *United States* v. *Leon*, 468 U.S. 897, 906-907 (1984).

This balancing approach was employed by the Court in a series of four cases to permit the use of illegally obtained evidence for the limited purpose of impeaching the credibility of a defendant whose testimony at trial conflicted with the suppressed evidence. *Walder* v. *United States*, 347 U.S. 62 (1954); *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975); *United States* v. *Havens*, 446 U.S. 620 (1980). This Court concluded that sufficient deterrence was provided by the exclusion of the tainted evidence from the State's case-in-chief, and that the benefits of the traditional truth-testing devices of cross-examination and impeachment ". . . should not be lost because of the speculative possibility that impermissible police conduct will be encouraged thereby." *Harris* v. *New York*, 401 U.S. at 225; *Oregon* v. *Hass*, 420 U.S. at 721-722; *United States* v. *Havens*, 446 U.S. at 626-628.

In petitioner's case a majority of the Illinois Supreme Court relied upon the above decisions to hold that statements which are the fruit of an illegal arrest may be used to rebut the inconsistent testimony of any witness called by the defense. While recognizing that such use of constitutionally tainted evidence went beyond that sanctioned by the decisions of this Court, the majority below concluded that the rule it announced would not impair the deterrent ends of the exclusionary rule. (J.A. 36-38) In reaching this conclusion the majority opinion overlooks the significant incentive which its new exception to the exclusionary rule gives to police officers to make arrests in the absence of probable cause. In view of the nature of this exception the danger that it will encourage police misconduct cannot be dismissed as a "speculative possibility."

The decision below increases the incentive to make unlawful arrests in two ways. First, it greatly expands

the situations in which statements obtained as a result of an illegal arrest may be used at trial. Prior to the decision in this case, such statements could be used only in response to a defendant's own testimony at trial. Should this decision be affirmed, in future cases the police will know that a tainted statement may be admitted if the defendant presents any evidence which conflicts with the statement. Secondly, under the rule adopted by the majority opinion below, the tainted evidence will also have greater prosecutorial value. The decisions of this Court presently permit the use of illegally obtained evidence solely for the limited purpose of impeachment. However, as addressed in Point I of petitioner's brief, when a defendant's tainted statements are introduced to rebut the testimony of a defense witness the very nature of the method of impeachment requires that the statements be used as substantive evidence of guilt.

Because of this increase in the value and possible use of tainted evidence sanctioned by the decision in this case, the fact that the evidence will not be available for the State's case-in-chief does not provide adequate deterrence. As one of the minority opinions below observed:

> Where law enforcement authorities know in advance that the only evidence against a potential defendant can only be obtained through unlawful means they may hesitate. But in any case in which the police officers can, through lawful means, acquire enough evidence to make out a case against a suspect, they will be strongly tempted to secure additional evidence illegally.

(J.A. 52) (Clark and Stamos, J.J., dissenting) In many cases, if not most, the prosecution does not require an incriminating statement from the accused to make out a prima facie case, and in such cases the inability to use the

statement as part of the State's case-in-chief will not serve as an effective deterrent.

The petitioner's case exemplifies this danger to the rights guaranteed by the Fourth Amendment. When Detectives Glynn and Regan arrested and interrogated petitioner without probable cause they were aware that there were several witnesses to the shooting, (R. 14-16) and thus knew it was unlikely that the exclusion of any statement they obtained would preclude the prosecution from making a prima facie case. In these circumstances under the decisions of this Court there would be only a limited incentive to risk losing evidence for the State's case-in-chief because a tainted statement could be used only for the purpose of impeaching the defendant's testimony. By contrast, under the decision below the incentive to make investigatory arrests would be greatly enhanced as the officers would know that any incriminating statement they obtained could also be used either to inhibit the defendant from presenting any evidence in his defense or as substantive evidence to rebut any defense testimony that was presented.

In response to petitioner's argument that the creation of a "rebuttal" exception to the exclusionary rule would seriously undermine the guarantees of the Fourth Amendment, the court below characterized its new exception as defining a very narrow area of operation. (J.A. 36) Specifically, the court held that an illegally obtained statement may only be used to rebut testimony of a defense witness that is elicited on direct examination and that is directly contrary to an assertion made in the defendant's statement; and that any part of the suppressed statement that can be characterized as a confession may not be used. (J.A. 36-37) That these

limitations will prove in practice to be illusory is demonstrated by petitioner's case itself.

The ostensible purpose for introducing petitioner's suppressed statements was to rebut Jewel Henderson's testimony that his hair was black on the day of the shooting. However, in addition to introducing petitioner's statements that his hair was reddish brown and combed straight back on the evening in question, the State was permitted to elicit his further statement that ". . . he had gone to the beauty parlor to have his hair . . . dyed black and curled in order to change his appearance." (J.A. 10-11) This latter statement went well beyond what was necessary to contradict Ms. Henderson, and in the circumstances of the case amounted to an admission of guilt, which is exactly how it was used in the prosecutor's closing argument. (J.A. 13-14)

Reported decisions reflect that on rare occasion other courts of review have been presented with a request by the government for the creation of an exception to the Fourth or Fifth Amendment exclusionary rule which would permit the use of illegally obtained evidence to rebut the testimony of defense witnesses. In the overwhelming majority of these cases the court refused to recognize an exception beyond that sanctioned by the decisions of this Court, concluding that to do so would undermine the deterrent ends of the exclusionary rule at issue. *United States* v. *Hinckley*, 672 F.2d 115, 133-134 (D.C. Cir. 1982); *State* v. *Hubbard*, 103 Wash. 2d 570, 693 P.2d 718, 721-722 (1985); *State* v. *Burnett*, 637 S.W.2d 680, 689-690 (Mo. 1982); *People* v. *Ricco*, 56 N.Y.2d 320, 437 N.E.2d 1097, 1100-1101 (1982); *People* v. *Walls*, 42 A.D.2d 575, 344 N.Y.S.2d 435, 436-437 (App.Div. 1973); *contra*, *Hendrickson* v. *State*, 290 Ark. 319, 719 S.W.2d 420, 423-424 (1986).

The conclusion of the Supreme Court of Illinois that police misconduct will not be encouraged by expansion of the impeachment exception stands in marked contrast to this weight of authority. This Court should also recognize the necessity to confine the impeachment exception to the limitations it presently sanctions in order to preserve the rights of citizens to be free from unlawful governmental intrusions.

CONCLUSION

Wherefore, petitioner prays that the judgment of the Illinois Supreme Court be reversed and the cause remanded for further proceedings.

Respectfully submitted,

THEODORE A. GOTTFRIED
Appellate Defender
MICHAEL J. PELLETIER
Deputy Defender
MARTIN S. CARLSON*
PATRICIA UNEINN
Assistant Appellate Defenders
Office of the State Appellate Defender
State of Illinois Center
100 West Randolph Street
Suite 5-500
Chicago, Illinois 60601
(312) 917-5472

**Counsel of Record*

No. 88-6075

Supreme Court, U.S.
FILED
JUN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DARRYL JAMES,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN *
ARLEEN C. ANDERSON
NATHAN P. MADDOX
MICHAEL J. SINGER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2235

Attorneys for Respondent

CECIL A. PARTEE
State's Attorney, County of Cook
909 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496
INGE FRYKLUND
SHARON JOHNSON COLEMAN
Assistant State's Attorneys

Of Counsel

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 34512—65—6-23-89)

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether Petitioner's statements, previously suppressed on Fourth Amendment grounds, may be used to rebut the testimony of a defense witness other than the Petitioner?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT:	
I.	
ALLOWING THE IMPEACHMENT OF A DEFENSE WITNESS WITH THE PRIOR INCONSISTENT STATEMENT OF THE DEFENDANT IS COMPATIBLE WITH THE POLICIES UNDERLYING THE EXCLUSIONARY RULE ANNOUNCED IN *WALDER, HARRIS, HAAS* AND *HAVENS*	10
A. The Use Of A Defendant's Suppressed Statement To Impeach A Defense Witness Comports With The Policies Underlying Established Restrictions On The Exclusionary Rule	10
B. The Prosecution Properly Impeached Jewel Henderson At Trial	15
II.	
THE STATE'S SUBSTANTIVE USE ON REBUTTAL OF AN ACCUSED'S PRIOR INCONSISTENT STATEMENT, OTHERWISE SUBJECT TO SUPPRESSION UNDER THE EXCLUSIONARY RULE, DOES NOT VIOLATE THE CONSTITUTION	22
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	PAGE
Chambers v. Mississippi, 410 U.S. 284 (1973)	27
Chapman v. California, 386 U.S. 18 (1967)	20
Cupp v. Naughten, 414 U.S. 141 (1973)	19
Harris v. New York, 401 U.S. 222 (1971)	6, 7, 11, 22, 26
Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)	18
Hendrickson v. State, 290 Ark. 319, 719 S.W.2d 420 (1986)	13
Jenkins v. Anderson, 447 U.S. 231 (1980)	16
Mapp v. Ohio, 367 U.S. 643 (1961)	10
Michigan v. Long, 463 U.S. 1032 (1983)	18
Oregon v. Haas, 420 U.S. 714 (1975)	7, 11, 26
People v. James, 123 Ill. 2d 523, 528 N.E.2d 723 (1988)	13, 14, 16, 18, 19, 21
Rock v. Arkansas, 483 U.S. 44 (1987)	27
Rose v. Clark, 478 U.S. 570 (1986)	21
Sandstrom v. Montana, 442 U.S. 510 (1979)	19
Stone v. Powell, 428 U.S. 465 (1976)	11, 14
Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)	13, 23, 27
United States v. Calandra, 414 U.S. 338 (1974)	11
United States v. Gibson, 726 F.2d 869 (1st Cir. 1984)	18

United States v. Hasting, 461 U.S. 499 (1983) ... 20
United States v. Havens, 446 U.S. 620 (1980) . 6, 7, 11, 26
United States v. Leon, 468 U.S. 897 (1984) 9, 24
United States v. Nobles, 422 U.S. 225 (1975) .. 27
Walder v. United States, 347 U.S. 62 (1954) 6, 7, 11, 12, 24, 25
Washington v. Texas, 388 U.S. 14 (1967) 26
Weeks v. United States, 232 U.S. 383 (1914) .. 10

Constitutional Provisions

U.S. Const. amend. IV 1
U.S. Const. amend. V 2
U.S. Const. amend. VI 2
U.S. Const. amend. XIV 2

Miscellaneous Authority

Illinois Pattern Jury Instructions, Criminal, No. 3.11 (2d ed. 1981) 19
6 J. Wigmore, Evidence, § 1873 (Chadbourn Rev. 1976) 23
2 C. Wright, Federal Practice and Procedure, § 482 (1982) 18

No. 88-6075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DARRYL JAMES,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Darryl James, was convicted of the murder of Gerilia Boyd and the attempt murder of Delbert Collins. The incident occurred on the night of August 30, 1982 in Chicago, Illinois, when Petitioner and two companions demanded money from a group of eight boys.

At the pre-trial proceedings, the trial court granted a defense motion to quash Petitioner's arrest and suppress evidence stemming from the arrest. (R. 60) The evidence suppressed was Petitioner's arrest at his mother's beauty shop, where police discovered Petitioner sitting under a hair dryer with curlers in his hair. (R. 19, 20) Also suppressed were Petitioner's statements admitting he had changed his hair color from reddish-brown to black. (Supp. R. 95-96, 136-37) Petitioner's motion to suppress was granted on the grounds of lack of probable cause for arrest. (R. 57)

In their case-in-chief, the People presented the testimony of five eyewitnesses to the Boyd-Collins shootings: John Brown, Perry Brown, Kenneth Brown, Darryl Hall and Delbert Collins. According to the testimony of each of the five boys, they were walking home from a party on the night of August 30, 1982, when three boys approached them and demanded money. (R. 293, 339, 385-87, 407-08, 427-28) When no money was surrendered, one member of the trio pulled out a gun and shot into the group of boys. (R. 302) Witness John Brown described the shooter as 5 feet 4 inches tall, light-complexioned, wearing an earring and a dark brown baseball cap, and having long reddish-brown hair combed straight back. (R. 294, 300-01) The other four witnesses to the shooting corroborated John Brown's testimony. (R. 343, 391, 412, 430)

At trial each of the five eyewitnesses pointed to Petitioner and identified him as the person who shot Gerilia Boyd and Delbert Collins. The witnesses stood firm in their identification despite their acknowledgement that Petitioner's hair was black in color and natural in style at the time of trial, which was almost two years after the incident. Four of the witnesses also testified that they had seen Petitioner two weeks before the shooting incident at a parade and at the time Petitioner's hair was long, red and slicked back. (R. 294-95, 340, 388-89, 408, 429) On cross-examination of each eyewitness, defense counsel repeatedly questioned and challenged their testimony describing Petitioner as having red hair at the time of the shooting. Despite counsel's efforts, all of the witnesses remained consistent in their descriptions of Petitioner on the night of the shooting and in their in-court identifications of Petitioner as the shooter. (R. 295, 316, 355-57, 364, 388, 408, 429)

The Petitioner opted not to testify in his own behalf, but he did present Ms. Jewel Henderson, a long-time family friend, as his primary witness. (J.A. 2-3) On direct examination, Ms. Henderson's testimony contradicted the description of Petitioner given by prosecution witnesses. (J.A. 3-4) She specifically stated that Petitioner had black hair, not red, on the night of August 30, 1982.

In rebuttal, the prosecutor sought to introduce Petitioner's statement to police that sometime after the shooting on August 30, Petitioner had changed his hair color from reddish-brown to black. (Supp. R. 62) Petitioner's counsel objected to the use of the statement on the grounds that they had been suppressed under the Fourth Amendment. (Supp. R. 63-64) Nonetheless, the Court agreed to the use of Petitioner's statement to impeach Ms. Henderson's testimony that Petitioner had black hair on the night of the shooting. (R. 64) Petitioner's counsel then moved

to suppress Petitioner's statement claiming it was involuntary. (Supp. R. 115) The trial court suspended the trial, held a hearing on the motion, and then denied the motion, finding that Petitioner's statement was voluntary. (Supp. R. 128) Petitioner's statement that on August 30, 1982 his hair was reddish-brown, long and combed straight back was presented to the jury through a police detective who also testified that Petitioner had admitted that he had changed his hairstyle and hair color. (J.A. 9-11) The detective further testified that Petitioner admitted that Petitioner had gone to his mother's beauty parlor to have his hair dyed black and curled in order to change his appearance. (J.A. 9-11)

After defense counsel cross-examined the detective, the trial court orally instructed the jury that Petitioner's statements about his hair were offered to impeach Jewel Henderson and refute and rebut the witness's testimony. (J.A. 12) There was no objection made to that instruction. However, Petitioner did present two relatives in surrebuttal to testify that his hair was black on August 30th and that he had never had red hair. (Supp. R. 150-51, 154) Prior to closing argument, Petitioner offered two instructions limiting the use of Petitioner's statement to impeachment only. (J.A. 13) The trial judge refused these instructions and, instead, gave the jury a pattern instruction on the use of prior inconsistent statements. (J.A. 16)

In rebuttal closing argument, the prosecutor argued that Petitioner's statement to police that his hair was red on the day of the shooting showed that he had a guilty conscience. Defense counsel's objection to this was overruled. The prosecutor also argued to the jury that the case against Petitioner amounted to five eyewitnesses to the crime who identified Petitioner as the gunman. The prosecutor also stated that the jury had heard an admission that Petitioner changed the color of his hair. Defense counsel's objections were overruled. (J.A. 14)

The jury received its written instructions from the court and found Petitioner guilty of the murder of Gerilia Boyd and guilty of the attempt murder and aggravated battery of Delbert Collins. (Supp. R. 250)

Petitioner appealed his convictions to the Illinois Appellate Court, which reversed the convictions and remanded the case for a new trial. The Appellate Court held that the admission of Petitioner's suppressed statement to rebut the testimony of a witness other than Petitioner was improper.

The Illinois Supreme Court reversed the Appellate Court decision by holding that when the direct testimony of a defense witness "squarely contradicts" suppressed evidence, then the suppressed evidence may be admitted to rebut the testimony of that witness. In so holding the Illinois court relied on the legal principles espoused by this Court in *Walder v. United States*, 347 U.S. 62 (1954); *Harris v. New York*, 401 U.S. 222 (1971); and *United States v. Havens*, 446 U.S. 620 (1980). The State Supreme Court then affirmed Petitioner's convictions for murder and attempt murder and later denied Petitioner's request for rehearing.

SUMMARY OF THE ARGUMENT

I. The primary justification for the exclusionary rule is that it deters police misconduct that violates Fourth Amendment rights. However, experience has demonstrated that an unyielding application of the exclusionary rule often undermines the fundamental goal of our legal system—arriving at the truth—without significantly deterring police misconduct. *United States v. Havens*, 446 U.S. 620 (1980).

This Court has restricted the application of the exclusionary rule where the criminal defendant attempts to utilize the suppression of the State's evidence as a license to falsely testify. *See Walder v. United States*, 347 U.S. 62 (1954); *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Haas*, 420 U.S. 714 (1975); *United States v. Havens*, 446 U.S. 620 (1980). The Court reasoned that the incremental furthering of the deterrent ends of the rule, by forbidding impeachment of the defendant who testifies, with its resulting impairment of the integrity of the fact-finding goals of the criminal trial, was insufficient to permit or require that false testimony pass unchallenged.

Extending the *Walder* rule to cases like the one at bar plugs a remaining hole in the exclusionary rule. In order to evade the proscriptions of *Walder, et al.*, a defendant may simply ask someone to lie for him or find someone who mistakenly believes certain facts which the defendant knows to be untrue. Just as the exclusionary rule should not be applied so as to allow a defendant to perjure himself, it should not be applied when the defendant is intentionally misrepresenting facts to the jury through other witnesses.

This restriction has inherent limitations which continue to protect the principles underlying the exclusionary rule. First, the rule is limited to impeachment of testimony that the defendant rightly controls—i.e., statements by a defense witness on direct examination. Second, the restriction arises only in cases in which the reliability of the suppressed statement is strong: i.e., the prosecution has presented sufficient corroboration of the suppressed statement, and the suppressed statement was made voluntarily.

This limited extension of *Walder* continues to serve the purposes underlying the exclusionary rule without impairing the truth-seeking function at trial.

Petitioner contends, however, that the use of his suppressed statement did not simply impeach the testimony of Jewel Henderson, but stood also as substantive proof of his guilt.

The introduction of evidence concerning an out-of-court statement to impeach an in-court statement, however, does not necessarily entail offering the statement as substantive evidence. In this case, Petitioner's statement concerning the color and style of his hair on the day of the murder impeached the veracity of Jewel Henderson for it tended to show that Ms. Henderson either erred or lied concerning the color of Petitioner's hair. This was not a substantive use of Petitioner's statement. The jury was then left to decide, in light of this information, whether Jewel Henderson was worthy of belief.

Petitioner raises issues relating to sufficiency of the jury instructions and the prosecutor's closing argument in order to prove that use of his statement could not be limited to impeachment. Any claim regarding the sufficiency of the trial court's oral limiting instruction is waived. Furthermore, the instructions given by the trial court properly limited the use of the suppressed statement. Finally, any error regarding either jury instructions or the prosecutor's argument was harmless.

II. Even if Petitioner is correct in his characterization of the use of this evidence, there is little justification for precluding the State from making substantive use of the Petitioner's prior inconsistent statement as rebuttal evidence. Indeed, the public interest in determination of the truth at trial outweighs the incremental contribution that might be made to protection of Fourth Amendment values by limiting the use of suppressed evidence to impeachment of a witness's veracity.

In this case, Petitioner chose to present testimony, through Jewel Henderson, that was contradictory to his own prior statement. Once Petitioner presented his case, including the testimony of Henderson, the State, on rebuttal, was entitled to present any evidence made necessary by the Petitioner's case in reply.

It is unrealistic to assume that application of the exclusionary rule to the prosecution's case in rebuttal would significantly further the goal of deterring police misconduct. Under these circumstances, the incentive to disregard the requirement of the Fourth Amendment, solely to obtain a statement from an accused that may later contradict testimony that he may present through a witness at trial, is negligible.

If the purpose of the exclusionary rule is to deter police misconduct, then the only justification for restricting the use of suppressed evidence to impeachment is if that restriction, in and of itself, contributes to the deterrence of unlawful police activity. Such a proposition cannot withstand the scrutiny of this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984).

In this case, the trial court properly enforced the exclusionary rule to the point where the benefits of its deterrent function were no longer being furthered. The prosecution made no attempt to offer the excluded evidence in its case-in-chief. It was only at the point in the trial where it became clear that the Petitioner was attempting to take advantage of its suppression in order to pervert the truth that the trial court removed the bar of the exclusionary rule. Leon, read in conjunction with Walder, dictates that the bar of the exclusionary rule should completely fall under these circumstances, thus allowing substantive use of the previously suppressed evidence.

ARGUMENT

I.

ALLOWING THE IMPEACHMENT OF A DEFENSE WITNESS WITH THE PRIOR INCONSISTENT STATEMENT OF THE DEFENDANT IS COMPATIBLE WITH THE POLICIES UNDERLYING THE EXCLUSIONARY RULE ANNOUNCED IN *WALDER, HARRIS, HAAS* AND *HAVENS*.

Petitioner urges that the Illinois Supreme Court's decision affirming the prosecution's impeachment of a defense witness with Petitioner's previously suppressed statement improperly extended this Court's prior decisions governing the Fourth Amendment exclusionary rule. However, examination of the policies underlying the exclusionary rule and those underlying the criminal trial, as a whole, demonstrates that the Illinois Supreme Court's decision was correct.

A. The Use Of A Defendant's Suppressed Statement To Impeach A Defense Witness Comports With The Policies Underlying Established Restrictions On The Exclusionary Rule.

This Court adopted the exclusionary rule as a prophylactic device to effectuate the Fourth Amendment right of all citizens "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . . ." *Weeks v. United States*, 232 U.S. 383, 389, 391-92 (1914). Under this Rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. *Mapp v. Ohio*, 367 U.S. 643 (1961).

The primary justification for the exclusionary rule is that it deters police misconduct that violates Fourth Amendment rights. *Stone v. Powell*, 428 U.S. 465, 486 (1976). However, despite the broad deterrent purpose of the exclusionary rule, this Court has never interpreted it to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. Indeed, experience has demonstrated that an unyielding application of the exclusionary rule often undermines the fundamental goal of our legal system—arriving at the truth—without significantly deterring police misconduct. *United States v. Havens*, 446 U.S. 620, 625 (1980); *Stone*, 428 U.S. at 491, n.5. Thus, as is the case with any remedial device, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

In determining whether to enforce the Rule in a given context, this Court has weighed the magnitude of the deterrent effect of enforcing the Rule against the impact of its application on the truth-seeking process. In a series of cases, this Court has restricted the application of the exclusionary rule where the criminal defendant attempts to utilize the suppression of the State's evidence as a license to falsely testify. *See Walder v. United States*, 347 U.S. 62 (1954); *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Haas*, 420 U.S. 714 (1975); *United States v. Havens*, 446 U.S. 620 (1980). The Court reasoned that the incremental furthering of the deterrent ends of the Rule, by forbidding impeachment of the defendant who testifies, with its resulting impairment of the integrity of the fact-finding goals of the criminal trial, was insufficient to permit or require that false testimony pass unchallenged. *Havens*, 446 U.S. at 627. *Walder* and its progeny hold

that the ends of the exclusionary rule are adequately implemented by denying the prosecution the use of the challenged evidence to make out its case-in-chief:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against the untruths.

Walder, 347 U.S. at 65.

After *Walder*, *Harris*, *Havens* and *Haas*, a defendant could no longer take the stand and perjure himself without opening himself up to impeachment by the Government, which included the offering of previously suppressed inconsistent statements. These decisions can thus be viewed as plugging a hole in the exclusionary rule which encouraged false testimony. Such a hole undermined the truth-seeking function of the trial without increasing the deterrent function of the exclusionary rule, and, therefore, the Rule yielded in order that the policy balance could be restored.

Extending the *Walder* rule to cases like the one at bar plugs a remaining hole in the exclusionary rule. In order to evade the proscriptions of *Walder, et al.*, a defendant may simply ask someone to lie for him or find someone who mistakenly believes certain facts which the defendant knows to be untrue. In this case, for example, five prosecution witnesses identified Petitioner as the man who shot Girelia Boyd and Delbert Collins. All five also testified that on the day of the shooting, Petitioner had red hair. Petitioner's suppressed statement, which the trial court found to have been voluntarily made, concurred with the testimony of the prosecution witnesses. Petitioner knew

this, but still, of his own volition, deliberately called Jewel Henderson to testify. He knew that she would wrongly testify that he had black hair on the day of the shooting. *See Taylor v. Illinois*, 484 U.S. 400, ____, 108 S.Ct. 646, 653, 98 L.Ed.2d 798, 811 (1988) (the right to present witnesses, in order to be effectively used must be preceded by deliberate planning and affirmative conduct by the defendant). Even if Jewel Henderson believed herself to be telling the truth, Petitioner knew she was wrong and deliberately called her to testify. Petitioner also believed that the prosecution would not be allowed to offer his suppressed statement that his hair was red.

Just as the exclusionary rule should not be applied so as to allow a defendant to perjure himself, it should not be applied when the defendant is intentionally misrepresenting facts to the jury through other witnesses. *People v. James*, 123 Ill.2d 523, 536, 528 N.E.2d 723, 729 (1988); *Hendrickson v. State*, 290 Ark. 319, 719 S.W.2d 420, 424 (1986).

Respondent's proposed restriction on the exclusionary rule does not undermine the deterrent function of the Rule and, therefore, is appropriate under *Walder* and its progeny. As noted above, explicit in these cases was the caveat that the exclusionary rule remained a strong restriction against the Government's use of illegally obtained evidence in its case-in-chief. However, in weighing the goal of truth-seeking against the deterrent effect of the exclusionary rule in those cases, it was held that there was only speculative possibility that the police would be invited to act illegally to garner evidence simply on the chance the defendant might take the stand and perjure himself as to that evidence. The same is true under the present circumstances. Exclusion of the suppressed statements here simply does not efficaciously serve the re-

medial objectives of the exclusionary rule. It is simply unfathomable that police will disregard the requirements of the Fourth Amendment solely to obtain a statement from an accused that may later contradict testimony the accused may present through a witness at trial. As in *Walder*, et al., any incremental deterrent effect gained by enforcing the Rule in this kind of case is speculative. This being the case, the efficacy of the deterrent function of the exclusionary rule "reaches a point of diminishing returns" when evidence is excluded beyond the prosecution's case-in-chief where a defendant, like Darryl James in this case, attempts to perpetrate a fraud on the court. *See Stone*, 428 U.S. at 493 n.34. Beyond this, the rule provides a windfall for such a defendant and frustrates the truth-seeking function of the trial.[1]

Furthermore, Respondent's proposed restriction has inherent limitations which protect the principles underlying the exclusionary rule. First, the rule is limited to impeachment of testimony that defendant rightly controls—i.e., statements by a defense witness on direct examination. *See James*, 123 Ill. 2d at 537, 528 N.E.2d at 729. Second, the restriction arises only in cases in which the reliability of the suppressed statement is strong: i.e., the prosecution has presented sufficient evidence corroborative of the suppressed statement, and the suppressed statement was made voluntarily. In this case, as stated above, five witnesses testified that Petitioner's hair was red on the day of the shooting,[2] and the trial court found that Petitioner had voluntarily told police that his hair had been red. The evidence, thus, was sufficiently reliable to remove any concern that it had been tainted by the alleged police misconduct. Under these circumstances, the evidence was properly admitted.

[1] Extending the *Walder* restriction to cases like this one does not hinder a defendant's right and ability to present a legitimate defense. The rule suggested here does not preclude the defendant from taking the stand and denying guilt, and it allows any defense witness to take the stand and present any testimony for the defendant—so long as neither contradict the defendant's own reliable, voluntary suppressed prior statement. *See* Argument II, *infra*. Indeed, a defense witness is only restrained from testifying as to any "fact" that a defendant is likewise restrained from offering under *Walder*, et al.

B. The Prosecution Properly Impeached Jewel Henderson At Trial.

The rationale offered in Section A for restricting the exclusionary rule in cases like this is the same as that of the Illinois Supreme Court's opinion below. That court reasoned that when the defendant purposely presents a statement which so contradicts a suppressed statement as to raise a presumption that defendant was attempting to take advantage of the fact of suppression, the exclusionary rule should yield to the ultimate truth-seeking function of the criminal trial. Petitioner does not dispute the rationale of the state court decision. Rather, he contends that to use the suppressed statement of Petitioner does not simply impeach the testimony of Jewel Henderson, but stands also as substantive proof of his guilt. This argument misapplies the relevant evidentiary principles.

The core of Petitioner's argument is that it is inherently impossible to impeach one witness's testimony with evidence of an out-of-court statement made by a second witness unless the out-of-court statement is offered for the

[2] Indeed, the only time that a defendant has any incentive to take the stand and lie or to call a witness to lie is when the prosecution has presented evidence directly contrary to the suppressed statement.

truth of the matter asserted. The introduction of evidence concerning an out-of-court statement to impeach an in-court statement does not necessarily entail offering the statement as substantive evidence.[3]

In this case, Petitioner's statements concerning the color and style of his hair on the day of the murder were introduced to impeach the veracity of Jewel Henderson. The statements tended to show that Ms. Henderson either erred or lied concerning the color of Petitioner's hair. This was not a substantive use of Petitioner's statement. The statement established only that at one time, Petitioner stated his hair was red on that day. The fact that he made that statement alone tended to call into question the veracity of Jewel Henderson. The jury was then left to decide, in light of this information, whether Jewel Henderson was worthy of belief.

Petitioner, nevetheless, contends that it is inherently impossible to limit the jury's consideration of this evidence in such a manner. As proof, he offers the trial court's oral limiting instruction to the jury, which he asserts demonstrates the impossibility. This assertion is in sharp contrast with the belief of his trial counsel, who clearly recognized that the jury's use of the evidence in question could indeed be limited to impeachment and who offered instructions which he believed would accomplish that end. (Supp. R. 159-62) Respondent agrees that trial counsel's instruc-

[3] As an initial matter, however, this Court has recognized that the formulation of underlying rules of evidence is a matter of state law. *Jenkins v. Anderson*, 447 U.S. 231, 239, n.5 (1980). In Petitioner's case, the Illinois Supreme Court determined that an out-of-court statement of one witness may be used to impeach the testimony of a second witness. *James*, 123 Ill. 2d at 538-40, 528 N.E. 2d at 730-31. Therefore, as a matter of state law, Petitioner's statement impeached Jewel Henderson.

tions would have properly limited the jury. That does not mean, however, that the instructions the trial court gave to the jury were insufficient. As further proof of impossibility, Petitioner argues that the prosecutor made improper reference to the statement in his rebuttal closing argument. Petitioner does not explain, however, how an alleged error in the prosecution's argument shows that the jury's use of Petitioner's statement cannot be limited to impeachment. Moreover, if either the trial court's instructions or the prosecution's argument constituted error, by allowing the jury to consider Petitioner's statement as substantive evidence, that error was harmless.

1. Improper Jury Instruction.

After Detective Glynn testified regarding Petitioner's prior inconsistent statement, counsel for Petitioner requested the judge to instruct the jury on the purpose for which this testimony was received. The trial judge instructed the jury as follows:

> It's offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red. (J.A. 12)

Petitioner did not object to this instruction at trial. Nonetheless, Petitioner argues that this instruction states the nature of impeachment by contradiction and illustrates that this method of impeachment requires that the contradicting evidence be used substantively. (Petitioner's Brief at 14)

To the extent that Petitioner is advancing this argument as a substantive ground for relief, his argument is of no avail. The Illinois Supreme Court held that Peti-

tioner waived any error in the oral instruction because he failed to object or to request further instruction. *James*, 123 Ill. 2d at 541, 528 N.E.2d at 730-31. "This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, ____ U.S. ____, 109 S.Ct. 1038, 1042, 103 L.Ed.2d 308, 316 (1989); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

To the extent that Petitioner advances this claim, not as a substantive ground for relief, but to demonstrate his theory that it is inherently impossible to limit the use of statements like Petitioner's to impeachment of a defense witness, his argument remains of no avail.

Certainly, the oral instruction, by its language, did not require that the jury believe Detective Glynn's testimony as substantive evidence. The judge clearly stated that the suppressed statement was being offered for the purpose of impeaching the testimony of Miss Henderson. While the second sentence of the instruction may be interpreted as over-emphasizing the weight which could be given to the suppressed statement, the trial judge rectified that possibility by giving the jury a written pattern instruction on the use of prior inconsistent statements:[4]

[4] Although Petitioner complains that the trial court refused the two alternative written instructions his attorney proposed, Respondent notes that the "trial court's charge to the jury need not follow the exact form and wording of the defendant's proposed instructions." *United States v. Gibson*, 726 F.2d 869, 874 (1st Cir. 1984). "It is enough that the charge adequately and correctly covers the substance of the requested instructions." 2 C. Wright, Federal Practice and Procedure § 482, at 688-89 (1982) (collecting authorities).

> The believability of a witness may be challenged by evidence that on some former occasion the witness made a statement that was not consistent with his testimony in this case and evidence of this kind may be considered by you only for the purpose of deciding the weight to be given the testimony you heard from the witnesses in this courtroom. Illinois Pattern Jury Instructions, Criminal, No. 3.11 (2d ed. 1981).

The Illinois Supreme Court correctly found that the instruction concerning the suppressed statement, in conjunction with the subsequent written instruction, properly informed the jury of the limited impeachment purpose for which Petitioner's statement could be used. *James*, 123 Ill. 2d at 539-40, 528 N.E.2d at 730-31. As this Court has stressed, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973).

Instructions bearing on matters such as burden of proof, the weight to be accorded different types of testimony, and other familiar subjects of jury instructions are designed to give the jury "some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard." *Naughten*, 414 U.S. at 148-49. The jury instructions in this case achieved that purpose. The well-recognized and long-established function of the trial judge to assist the jury by such instructions should not be "parsed" by such abstract nuances as Petitioner suggests here. It is unlikely that "this jury was so attentively attuned to the instructions of the trial court that it divined the difference recognized by lawyers between ['impeach'] and ['rebut']. . . ." *Sandstrom v. Montana*, 442 U.S. 510, 528 (1979) (Rehnquist, J., concurring) (original language comparing "presume" and "infer"). This is particularly likely in this case, where the instruction at issue

was an oral one, later modified and clarified by a written instruction, which clearly limited the use of prior inconsistent statements to impeachment.

Even if the trial court erred in instructing the jury, the error was harmless. *See Chapman v. California*, 386 U.S. 18, 22 (1967) (articulating standard). Harmless error analysis requires the reviewing court to discern whether it is clear beyond a reasonable doubt that, absent the error, the jury would have returned a guilty verdict. *United States v. Hasting*, 461 U.S. 499, 510-11 (1983). In this case, such an inquiry amounts to asking whether Petitioner would still have been found guilty had the trial court not included language referring to rebuttal in the oral instruction.

Five eyewitnesses, including victim Delbert Collins, identified Petitioner in-court as the person who shot Collins and Girelia Boyd on August 30, 1982. (R. 294-95, 340, 388-89, 408, 429) Furthermore, each of these witnesses recognized Petitioner from a previous occasion. The record reveals that these witnesses stood "about nine steps in front" of Petitioner when he drew his gun. (R. 302) The shooting occurred in a well-lighted area. (R. 312) All five witnesses described the shooter as a short black male, who wore an earring in his left ear. (R. 302, 343, 391, 412, 430) The most prominent feature described by all of the witnesses was Petitioner's long, reddish-brown, slicked back hair. (R. 294, 300-01, 343, 391, 412, 430) This evidence had to be weighed by the jury in light of Petitioner's case which consisted only of Jewel Henderson's testimony and that of two relatives who testified on surrebuttal that Petitioner's hair was black on the day of the shooting. The veracity of this testimony was thoroughly impeached, however, by Petitioner's own statement that his hair had been red on that day. Petitioner's hair was also black at trial,

and he had grown taller in the year and a half since the shooting. (R. 301) On this record, it is inconceivable that the jury would not have found Petitioner guilty. Therefore, any error regarding the instructions, or even the admission of the suppressed statement, was harmless beyond a reasonable doubt.

2. Closing Argument.

Petitioner further argues that the prosecution made improper references to his prior statement during its rebuttal closing argument and, thus, did not use the statement for the limited purpose of impeachment. Instead, he contends the State relied upon the statement as affirmative proof of Petitioner's guilt. (Petitioner's Brief at 16)

The Illinois Supreme Court found that the prosecutor's reference was harmless. *James*, 123 Ill. 2d at 541, 528 N.E.2d at 731. As argued above, if a reviewing court finds, beyond a reasonable doubt, that the jury would have returned a guilty verdict despite the error, the judgment should be affirmed. *Rose v. Clark*, 478 U.S. 570, 579 (1986).

As the facts reviewed in subsection 1 show, the State established Petitioner's guilt beyond a reasonable doubt, independent of any error in the prosecution's rebuttal closing argument. The prosecutor's statement was little more than a passing reference. *James*, 123 Ill. 2d at 541, 528 N.E.2d at 731. The prosecutor did not dwell upon Petitioner's statement or make it the focus of his argument. Furthermore, the jury was ultimately instructed as to the proper purpose for which the Petitioner's statement could be used. *James*, 123 Ill. 2d at 541, 528 N.E.2d at 731. In this context, any error which may have resulted from the prosecutor's reference simply does not rise to the level

of error necessary to warrant reversal of an otherwise valid conviction.

II.

THE STATE'S SUBSTANTIVE USE ON REBUTTAL OF AN ACCUSED'S PRIOR INCONSISTENT STATEMENT, OTHERWISE SUBJECT TO SUPPRESSION UNDER THE EXCLUSIONARY RULE, DOES NOT VIOLATE THE CONSTITUTION.

As discussed in Argument I, Petitioner contends that the prosecution's offering of his suppressed statement amounted to a substantive use of the evidence. The decisions in *Walder*, et al., would appear to limit the use of that evidence solely to impeach the testimony of Jewel Henderson. In fact, however, even if Petitioner is correct in his characterization of the use of this evidence, Respondent asserts that there is little justification for precluding the Government from making substantive use of the Petitioner's prior inconsistent statement as rebuttal evidence. Indeed, the public interest in determination of the truth at trial outweighs the incremental contribution that might be made to the protection of Fourth Amendment values by limiting the use of suppressed evidence to impeachment of a witness's veracity.

As stated above, the need for deterrence—the rationale for excluding illegally seized evidence—is strongest when the Government's unlawful conduct would yield substantive evidence which could be used to prove the elements of its case against an accused in a subsequent criminal prosecution. Generally, therefore, illegally secured evidence is unavailable to the Government for substantive use in its case-in-chief. *Harris v. New York*, 401 U.S. 222, 225 (1971).

In this case, the State made no attempt to introduce the tainted evidence in its case-in-chief. Furthermore, no governmental action induced the Petitioner to present the testimony he did in his case. The Petitioner's right to present the testimony of witnesses provides him with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant.

The very nature of the right to present testimony requires that its effective use be preceded by deliberate planning and affirmative conduct on the part of the defendant. *Taylor v. Illinois*, 484 U.S. 400, ____, 108 S.Ct. 646, 653, 98 L.Ed.2d 798, 811 (1988). Here, Petitioner chose to present testimony, through Jewel Henderson, that was contradictory to his own prior statement. Once Petitioner presented his case, including the testimony of Henderson, the State, on rebuttal, was entitled to present any evidence made necessary by the Petitioner's case in reply. *See* 6 J. Wigmore, Evidence § 1873 (Chadbourn rev. 1976).

As argued above, it is unrealistic to assume that application of the exclusionary rule to the prosecution's case in rebuttal would significantly further the goal of deterring police misconduct. Under these circumstances, the incentive to disregard the requirement of the Fourth Amendment, solely to obtain a statement from an accused that may later contradict testimony he presents through a witness at trial, is negligible. The police simply cannot know beforehand what part of the State's case the defendant will dispute. Therefore, by excluding the evidence in rebuttal, a speculative and undoubtedly minimal advance in the deterrence of police misconduct is achieved at the expense of impeding the fundamental goal of arriving at the truth in criminal trials.

Indeed, if the purpose of the exclusionary rule is to deter police misconduct, then the only justification for restricting the use of suppressed evidence to impeachment is if that restriction, in and of itself, contributes to the deterrence of unlawful police activity. Such a proposition cannot withstand the scrutiny of this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984).

In *Leon*, this Court refused to enforce the exclusionary rule where law enforcement officers, acting in good-faith reliance on a judicially-issued warrant which was later determined to be invalid, made an unlawful arrest or seizure of evidence. *Leon* held that the prosecution may use evidence seized under such a warrant as substantive proof of guilt in its case-in-chief. The rationale for this decision is that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges," and to exclude such evidence undermines the truth-seeking function of the trial without furthering the deterrent purpose of the exclusionary rule. *Id.* at 913-15.

Leon instructs that when the level of deterrence derived from exclusion is infinitely outweighed by the undermining of the truth-seeking function, the bar of the exclusionary rule falls entirely. *Walder v. United States*, 347 U.S. 65 (1954), and its progeny indicate that the level of deterrence achieved by exclusion when the police have arguably conducted themselves improperly outweighs the damage to the truth-seeking function to the extent that the prosecution should never be allowed to offer illegally secured evidence in its case-in-chief; however, the balance is lost if the defendant attempts to manipulate the trial by taking advantage of suppression to present a fabricated defense. Thus, the exclusionary rule falls in order to restore the policy balance.

Leon serves as a persuasive argument that this Court has not considered there to be some talismanic significance to the level of deterrence achieved by limiting the use of suppressed evidence to impeachment as opposed to allowing its substantive use. *Leon* makes clear that if the deterrent function of the exclusionary rule is not served, then the rule falls entirely, and the prosecution may offer the previously suppressed evidence for any purpose. The only end the exclusionary rule accomplishes in those situations is to undermine the truth-seeking function of the trial.

In this case, the trial court properly enforced the exclusionary rule to the point where the benefits of its deterrent function were no longer being furthered. The prosecution made no attempt to offer the excluded evidence in its case-in-chief. It was only at the point in the trial where it became clear that the Petitioner was attempting to take advantage of its suppression in order to pervert the truth that the trial court removed the bar of the exclusionary rule. *Walder* and its progeny hold that at that point, the deterrent effect of the exclusionary rule is negligible when compared to the undermining of the truth-seeking function. *Leon*, read in conjunction with *Walder*, dictates that the bar of the exclusionary rule should completely fall under these circumstances, thus allowing substantive use of the previously suppressed evidence.

To allow the prosecution to make substantive use of previously suppressed evidence on rebuttal does not undermine the concern this Court expressed in *Walder*, 347 U.S. at 65:

> Of course the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the

> case against him without thereby giving leave to the Government to introduce by way of rebuttal, evidence illegally secured by it, and therefore not available for its case-in-chief.

This concern has also been expressed by several members of the Court in dissenting opinions since *Walder. Harris*, 401 U.S. at 228-30 (dissenting opinion of Justices Brennan, Marshall and Douglas ([the] accused is denied an "unfettered choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged.);[5] *Oregon v. Haas*, 420 U.S. 714, 724-25 (1975) (Brennan and Marshall, JJ., dissenting); *United States v. Havens*, 446 U.S. 620, 631 (1980) (Brennan, Marshall, Stevens and Stewart, JJ., dissenting).

A defendant is accorded "the fullest opportunity to meet the accusation against him" through the Constitution's guarantee of the right to offer the testimony of witnesses. The right to offer testimony is grounded in the Compulsory Process Clause of the Sixth Amendment which is incorporated by the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). The Sixth Amendment includes a defendant's right to testify himself, should he

[5] Justice Brennan has indicated that although evidence of prior inconsistent utterances or behavior may ostensibly be offered merely to attack a defendant's credibility by contradicting his trial testimony, such evidence can also serve to buttress the affirmative elements of the prosecution's case. *Havens*, 446 U.S. at 632, n.2 (Brennan, J., et al., dissenting). "An incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt and no constitutional distinction can legitimately be drawn." *Harris*, 401 U.S. at 231 (Brennan, J., et al., dissenting); *Haas*, 420 U.S. at 724 (Brennan, J., et al., dissenting).

decide it is in his favor to do so. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987).[6]

The right to present relevant testimony, however, is not without limits. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence; the interest in the fair and efficient administration of justice; and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance. *Taylor v. Illinois*, 484 U.S. 400, ____, 108 S.Ct. 646, 653, 98 L.Ed.2d 798, 811 (1988).

Accordingly, the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *Id.*, 484 U.S. at ____, 108 S.Ct. at 653, 98 L.Ed. 2d at 811. A defendant cannot "invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *United States v. Nobles*, 422 U.S. 225, 241 (1975). Undoubtedly, neither can one invoke the Sixth Amendment as a justification for presenting deliberately fabricated testimony. It would demean the high purpose of the Compulsory Process Clause to construe it as encompassing an absolute right to present presumptively perjured testimony to a jury.

Allowing the State to use substantively, as rebuttal evidence, an accused's prior inconsistent statement otherwise

[6] The opportunity to testify in one's own behalf is also a necessary corollary of the Fifth Amendment's guarantee against compelled testimony. *Rock v. Arkansas*, 483 U.S. at 51.

suppressible under the exclusionary rule, is not an arbitrary restriction on the accused's right to present testimony. Nor is it disproportionate to the purposes such a practice is intended to serve. In *Walder*, *Harris*, *Haas*, and *Havens*, this Court rejected the notion that the defendant's constitutional shield against having illegally seized evidence used against him could be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. This Court should now reject any suggestion that the accused be allowed to invoke the Sixth (or Fifth) Amendment as a justification for presenting presumptively perjured testimony, with the resulting impairment of the integrity of the fact-finding goals of the criminal trial process.

CONCLUSION

For all of the foregoing reasons, Respondent, the People of the State of Illinois, respectfully request this Court to affirm the decision of the Illinois Supreme Court reinstating Petitioner's conviction and sentence.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN *
ARLEEN C. ANDERSON
NATHAN P. MADDOX
MICHAEL J. SINGER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2235

Attorneys for Respondent

CECIL A. PARTEE
State's Attorney, County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496

INGE FRYKLUND
SHARON JOHNSON COLEMAN
Assistant State's Attorneys

Of Counsel

* Counsel of Record

Supreme Court, U.S.
FILED
OCT 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No 88-6075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DARRYL JAMES,

Petitioner,

v.

Illinois,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF

MICHAEL J. PELLETIER
Deputy Defender

MARTIN S. CARLSON*
PATRICIA UNSINN
Assistant Appellate Defenders
Office of the State Appellate Defender
State of Illinois Center
100 West Randolph Street
Suite 5-500
Chicago, Illinois 60601
(312) 917-5472

**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

15 cp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. CONTRARY TO THE DECISIONS OF THIS COURT, THE ADMISSION OF PETITIONER'S SUPPRESSED STATEMENTS TO REBUT THE TESTIMONY OF A WITNESS CALLED IN HIS DEFENSE ALLOWED THE STATE TO USE THIS ILLEGALLY OBTAINED EVIDENCE AS SUBSTANTIVE PROOF OF GUILT .. 1

A. The Use Of A Defendant's Statement To Rebut The Testimony Of A Defense Witness Requires That The Statements Be Admitted As Substantive Evidence 1

B. The Decisions Of This Court Do Not Permit The Use Of Illegally Obtained Evidence As Substantive Proof Of Guilt At Any Stage Of The Trial 3

II. AFFIRMANCE OF THE DECISION BELOW WOULD UNDERMINE THE DETERRENT FUNCTION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE BY PROVIDING THE POLICE WITH A SIGNIFICANT INCENTIVE TO MAKE ARRESTS FOR QUESTIONING IN THE ABSENCE OF PROBABLE CAUSE 6

A. Respondent's Contention, That Permitting The Use Of Illegally Obtained Statements For Rebuttal Purposes Would Not Provide A Significant Incentive For Police Misconduct, Ignores The Greatly Enhanced Value To The Government That Tainted Statements Would Have Under This Board Exception To The Exclusionary Rule 6

B. The Cost To The Truth-Seeking Process Of Continuing To Bar The Use Of Tainted Evidence For Rebuttal Purposes Is No More Than Is Necessary To Deter Fourth Amendment Violations 9

TABLE OF AUTHORITIES

Cases	Page
Berkemer v. *McCarty*, 468 U.S. 420 (1984)	4
Brown v. *Illinois*, 422 U.S. 590 (1975)	8
Harris v. *New York*, 401 U.S. 222 (1971)	4, 5
Jenkins v. *Anderson*, 447 U.S. 231 (1980)	10
New York v. *Quarles*, 467 U.S. 649 (1984)	5
Oregon v. *Hass*, 420 U.S. 714 (1975)	4, 5
Richardson v. *Marsh*, 481 U.S. 200 (1987)	4
State v. *Hubbard*, 103 Wash.2d 570, 693 P.2d 718 (1985)	8
Stone v. *Powell*, 428 U.S. 465 (1976)	10
United States v. *Havens*, 446 U.S. 620 (1980)	4, 5
United States v. *Janis*, 428 U.S. 433 (1976)	7
United States v. *Leon*, 468 U.S. 897 (1984)	8, 9
Walder v. *United States*, 347 U.S. 62 (1954)	4, 5, 10

MISCELLANEOUS

3A J. Wigmore, Evidence §§ 1000, 1018 (Chadbourne Rev. 1970)	1

ARGUMENT

I. CONTRARY TO THE DECISIONS OF THIS COURT, THE ADMISSION OF PETITIONER'S SUPPRESSED STATEMENTS TO REBUT THE TESTIMONY OF A WITNESS CALLED IN HIS DEFENSE ALLOWED THE STATE TO USE THIS ILLEGALLY OBTAINED EVIDENCE AS SUBSTANTIVE PROOF OF GUILT.

A. The Use Of A Defendant's Statements To Rebut The Testimony Of A Defense Witness Requires That The Statements Be Admitted As Substantive Evidence.

Respondent initially disputes the proposition that the method of impeachment at issue here necessarily involves the introduction of the rebutting statements to prove the truth of the matter asserted therein. According to respondent, in the present case the evidence that petitioner at one time stated that his hair was red on the day of the offenses without more served to discredit Jewel Henderson's contrary testimony. (Brief for Respondent 15-16) No authority is cited in support of this assertion, nor does respondent suggest how petitioner's statement would tend to show that Ms. Henderson lied or erred without the jury first finding that petitioner's statement embodied the truth.

By advancing this argument respondent repeats the error of the majority opinion below in failing to recognize the differing theories of relevancy underlying impeachment by self-contradiction and impeachment by contradiction. (J.A. 38) In the former case the mere fact that a witness has previously made an inconsistent statement does by itself serve to discredit him; but in the latter case, at issue here, the witness will be discredited only if the trier of facts accepts the contradicting testimony as true. 3A J. Wigmore, Evidence § 1000, 1018 (Chadbourne rev. 1970). Thus, in order to discredit Jewel Henderson's testimony, petitioner's tainted statements had to be admitted

and used as substantive proof of the color of his hair on the date in question.[1]

Because discrediting a witness' testimony by rebuttal is based upon proving that the witness erred, respondent's contention that it is possible to limit rebuttal evidence to a non-substantive purpose is untenable. (Brief for Respondent 16-17, 18-19) In the present case, for example, it would do no good to instruct the jury that the evidence concerning petitioner's statements could be considered only as it may affect the believability of Jewel Henderson and not as evidence of the crimes charged, since petitioner' statements would affect Ms. Henderson's believability only if the jury concluded that the facts stated therein were true. That petitioner's trial counsel tendered such an instruction (J.A. 13) does not support respondent's contention that this evidence could be properly limited to "impeachment". (Brief for Respondent 16) After trial counsel's objections to the admission of petitioner's statements were overruled, his request for a limiting instruction reflects nothing more than an attempt to mitigate the prejudice; (Supp. R. 131-134, 159-160) it does not establish that he believed such an instruction would or could be efficacious.

Finally, respondent argues at length that for various reasons any error in the instructions or the prosecutor's closing argument does not warrant reversal. (Brief for Respondent 17-22) These arguments need not be

[1] With respect to this issue petitioner and respondent's *amicus* are in complete accord. (See Brief for the United States 14 n.3) Petitioner also agrees with respondent's *amicus* that the interests of clarity would be better served by referring to impeachment by contradiction as rebuttal. (*Ibid.* n.3 at 15; see also the dissenting opinion of Justices Clark and Stamos below, J.A. 47-49)

addressed as petitioner does not urge either of these issues as an independent ground for relief. In his brief petitioner cites that trial court's oral limiting instruction and the prosecutor's closing argument only as support for his contention that the introduction his tainted statements as rebuttal evidence involved the use of these statements as substantive proof of guilt. Beyond this purpose, the relevance of these matters lies in the fact that they were relied upon by the Illinois Appellate Court as reasons why the error in admitting petitioner's statements could not be deemed harmless. (J.A. 22-23)

B. The Decisions Of This Court Do Not Permit The Use Of Illegally Obtained Evidence As Substantive Proof Of Guilt At Any Stage Of The Trial.

While respondent does not dispute this point, (Brief for Respondent 22) respondent's *amicus* argues that the use of illegally obtained evidence for rebuttal purposes is not at odds with the decisions of this Court in the impeachment exception cases. According to the United States, in each of these cases the Court merely noted that instructions were given limiting the use of the tainted evidence to the issue of the defendant's credibility but did not rely on this fact in sanctioning the admission of the evidence. As respondent's *amicus* views these cases, the controlling consideration was not the purpose for which the tainted evidence was used but rather was the fact that it was not introduced during the government's case in chief. (Brief for the United States 17-18) This reading of the impeachment exception cases is refuted not only the specific holding in each case but also by later decisions of the Court characterizing these holdings.

In each of the impeachment exception cases the Court held that the constitution did not forbid the use of illegally

obtained evidence for the non-substantive purpose of challenging the defendant's credibility. *Walder* v. *United States*, 347 U.S. 62, 64 (1954) (physical evidence admissible "solely for the purpose of attacking the defendant's credibility"); *Harris* v. *New York*, 401 U.S. 222, 226 (1971) ("petitioner's credibility was appropriately impeached by use of his earlier conflicting statements"); *Oregon* v. *Hass*, 420 U.S. 714, 723 (1975) (defendant's statements not inadmissible "for purposes of [his] impeachment"); *United States* v. *Havens*, 446 U.S. 620, 627 (1980) (defendant's testimony on proper cross-examination "subject to otherwise proper impeachment" with illegally obtained evidence). These specific holdings demonstrate that the Court's reference to the limiting instruction given in each case was not incidental, as the United States suggests, but rather that the fact that instructions were given limiting the tainted evidence to a non-substantive purpose was essential to the Court's judgment.

That the impeachment exception decisions were based on the fact that the tainted evidence was not used as proof of guilt is shown in subsequent cases. For example, in *Berkemer* v. *McCarty*, 468 U.S. 420 (1984), the Court stated that in *Harris* v. *New York*,

> . . . the Court did sanction use of statements obtained in violation of *Miranda* to impeach the defendant who had made them. The Court was careful to note, however, that the jury had been instructed to consider the statements "only in passing on [the defendant's] credibility and not as evidence of guilt" (citation omitted)

468 U.S. at 429 n.9. In *Richardson* v. *Marsh*, 481 U.S. 200 (1987), as an example of the assumption that jurors follow their instructions, the Court observed that in *Harris* v. *New York*,

> . . . we held that statements elicited from a defendant in violation of *Miranda* v. *Arizona*, (citation omitted) can be introduced to impeach the defendant's credibility, even though they are inadmissible as evidence of his guilt, so long as the jury is instructed accordingly.

481 U.S. at 206-207. See also, *New York* v. *Quarles*, 467 U.S. 649, 575 n.6 (Marshall, Brennan and Stevens, JJ., dissenting) (in *Harris* v. *New York* introduction of statements to impeach a defendant ". . . was tolerated only because the jury had been instructed to consider the statements 'only in passing on [the defendant's] credibility and not as evidence of guilt'" (citation omitted)).

It is true that in *Harris*, *Hass* and *Havens* the Court concluded that the ends of the exclusionary rules were adequately served when the tainted evidence was made unavailable to the prosecution in its case in chief. *Harris*, 401 U.S. at 225; *Hass* 420 U.S. at 722; *Havens*, 446 U.S. at 627. However, this conclusion was reached solely in context of the use of illegally obtained evidence for the limited purpose of impeachment and provides no support for the proposition that such evidence could be used substantively at the rebuttal stage of the trial. Any such notion is dispelled by the Court's holding in *Havens* that a defendant's testimony on proper cross-examination is subject to impeachment by illegally obtained evidence ". . . that is inadmissible on the government's direct case, *or otherwise*, as substantive evidence of guilt." *United States* v. *Havens*, 446 U.S. at 628. (emphasis added)

Because the admission of tainted evidence for rebuttal purposes has the prohibited effect of allowing the government to use the fruits of its unlawful conduct to secure a conviction, *Walder* v. *United States*, 347 U.S. 62, 64-65 (1954), it is unquestionably at odds with the Court's

impeachment exception cases. Indeed, affirmance of the judgment below would necessarily mean that limiting instructions need no longer be given in cases in which a defendant's testimony is at issue. If illegally obtained evidence may be used substantively to rebut the testimony of defense witnesses, there would be no basis for continuing to forbid such use with respect to a defendant's own testimony.

II. AFFIRMANCE OF THE DECISION BELOW WOULD UNDERMINE THE DETERRENT FUNCTION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE BY PROVIDING THE POLICE WITH A SIGNIFICANT INCENTIVE TO MAKE ARRESTS FOR QUESTIONING IN THE ABSENCE OF PROBABLE CAUSE.

A. Respondent's Contention, That Permitting The Use Of Illegally Obtained Statements For Rebuttal Purposes Would Not Provide A Significant Incentive For Police Misconduct, Ignores The Greatly Enhanced Value To The Government That Tainted Statements Would Have Under This Broad Exception To The Exclusionary Rule.

Respondents argues that because illegally obtained statements will still be inadmissible in the State's case in chief, the possibility that adoption of a rebuttal exception to the exclusionary rule would encourage police misconduct is not greater than that which the Court deemed speculative in its impeachment exception cases. In respondent's view it is unrealistic to assume that police officers will make illegal arrests to obtain statements that could only be used to contradict the testimony of a witness that the defendant may call in his defense. (Brief for Respondent 13-14, 23) In advancing this argument respondent fails to recognize, or acknowledge, the true extent to which tainted statements would be of value to the prosecution under a rebuttal exception.

First, after allowing that ". . . the need for deterrence . . . is strongest when the Government's unlawful conduct would yield substantive evidence which could be used to prove the elements of its case against an accused . . .", (Brief for Respondent 22) respondent simply ignores the fact that this is precisely the purpose for which illegally obtained evidence will be admissible if the rule it argues for is adopted. Moreover, as noted above, if a rebuttal exception is sanctioned its rationale would permit the substantive use of tainted evidence when introduced to challenge a defendant's own testimony as well as that of any defense witness. (Reply Brief) Approval of a rebuttal exception would therefore invite Fourth Amendment violations because statements derived therefrom would be of far greater benefit to the prosecution in terms of both probative value and opportunity for use at trial than is presently true under the impeachment exception.

Secondly, the greater incentive for police misconduct that would exist if the decision below is affirmed does not depend on the actual use of the tainted statements at trial as the majority opinion believed. (J.A. 36) Because illegally obtained statements would be admissible as substantive proof of guilt under a rebuttal exception, police officers will expect that in many cases the accused will choose not to present any testimony in his defense rather than face the introduction of such damaging evidence. The failure of the defendant to present any evidence obviously enhances the prospects for obtaining a conviction, the objective which lies at the heart of a police officer's "zone of primary interest." *United States* v. *Janis*, 428 U.S. 433, 458 (1976). Thus, the incentive to obtain statements by unconstitutional methods for this purpose cannot be discounted as unrealistic or speculative. As one of the dissenting opinions below observed, allowing the use of tainted evidence for rebuttal

> . . . would unduly encourage law enforcement authorities to violate the fourth amendment routinely so as to garner evidence which could be held in reserve, thereby inhibiting the accused from presenting evidence in his own defense.

(J.A. 44) (Clark and Stamos, JJ., dissenting) See also, *State* v. *Hubbard*, 103 Wash.2d 570, 693 P.2d 718, 722 (1985).

Contrary to respondent's suggestion (Brief for Respondent 27-28) the above concern does not depend on the assertion of a Sixth Amendment right to present false testimony. Petitioner does not contend that such a right exists, and in the context of deterring police misconduct its non-existence is irrelevant. When the issue is the impact a particular rule will have on deterrence, the focus must necessarily be on the perspective of the relevant actor, and the controlling question is whether the adoption of the rule will encourage constitutional violations. *Brown* v. *Illinois*, 422 U.S. 590, 602 (1975). In the present case, adoption of a rebuttal exception would provide the police with a greater incentive to make unlawful arrests because statements obtained thereby would be of value as a means to deter the accused from presenting any evidence in his defense; and from the point of view of the police, the fact that this chilling effect may be a permissible one under the Sixth Amendment is irrelevant.

Finally, respondent cites the Court's decision in *United States* v. *Leon*, 468 U.S. 897 (1984) as supporting the proposition that in terms of the effect in deterrence, there is no significant difference between permitting tainted evidence to be used for impeachment and permitting its use as substantive evidence. (Brief for Respondent 24-25) Respondent's reliance on *Leon* is wholly misplaced as that case has nothing to do with the issue presented here. It is

true that in *Leon* the Court held that on the facts before it the exclusionary rule did not bar the use of illegally obtained evidence as substantive proof in the government's case in chief. However, this holding was not in any way based on a conclusion that permitting the substantive use of tainted evidence would not serve to encourage police misconduct; it was based on the Court's conclusion that when the police act in objectively reasonable reliance on a search warrant, there is no police misconduct to deter. *Leon*, 468 U.S. at 919-921.

The present case does not involve good faith or warrants, nor does it involve "alleged" police misconduct. (Brief for Respondent 15) The trial court found that petitioner was arrested and questioned by the police in the absence of probable cause, and respondent has never challenged that finding. The question before the Court is whether permitting tainted statements to be used as substantive evidence in rebuttal will encourage such serious Fourth Amendment violations, and with respect to this question the Court's decision in *Leon* provides no support for respondent's position.

B. The Cost To The Truth-Seeking Process Of Continuing To Bar The Use Of Tainted Evidence For Rebuttal Purposes Is No More Than Is Necessary To Deter Fourth Amendment Violations.

Respondent argues that the rule adopted by the Illinois Supreme Court should be approved because the harm to fact-finding process at trial caused by prohibiting the use of illegally obtained evidence for rebuttal purposes is equal to that involved in the impeachment exception cases. (Brief for Respondent 11-13) It is of course undeniable that application of the exclusionary rule to rebuttal evidence means that the prosecution is unable to use relevant evidence to challenge the conflicting testi-

mony of defense witnesses, but this is only one-half of the equation under the Court's balancing test. The suppression of probative evidence is not too great a cost when necessary to deter Fourth Amendment violations. *Stone* v. *Powell*, 428 U.S. 465, 492-493 (1976). The sanctioning of a rebuttal exception would provide far more incentive for police misconduct than is present under the limited impeachment exception. Therefore, while the cost to the fact-finding process may be similar, the greater harm to deterrence under a rebuttal exception mandates that the balance be struck in favor of exclusion.

Furthermore, respondent in fact overstates the cost of barring the use of illegally obtained statements for rebuttal purposes. Respondent asserts that such a bar presents the same danger of the integrity of the adversary process that the Court sought to prevent in the impeachment exception cases, by allowing a defendant to present false evidence through other witnesses. (Brief for Respondent 11-13; See also, Brief for the United States 16 (such a bar "grants a license to engage in perjury by proxy")) However, in this regard the situation at issue here and that involved in the impeachment exception cases differ in two respects.

When a defendant's testimony is inconsistent with his own prior statement, this self-contradiction necessarily casts doubt upon his veracity. In such a case, "[it is] logical to infer, absent an explanation to the contrary, that the defendant was lying on one occasion or the other," *Jenkins* v. *Anderson*, 447 U.S. 231, 253 (1980) (Marshall and Brennan JJ., dissenting), and was resorting to perjurious testimony in reliance on the shield of the exclusionary rule. *Walder* v. *United States*, 347 U.S. 62, 65 (1954). When the testimony of another witness conflicts with the defendant's statement, however, an inference of

perjury on the witness' part cannot be drawn because the inconsistency may be due to "differing impressions or recollections by the defendant and the witness." (J.A. 43) (Ward and Stamos JJ., dissenting)

Secondly, the potential for the use of perjury is much greater in the case of the testimony of defendants than is true for other witnesses. Any defendant can testify falsely if he chooses to do so, but contrary to respondent's assertion that "a defendant may simply ask someone to lie for him," (Brief for Respondent 12) it cannot be assumed that it will be so easy to find others who are willing to commit perjury. While a defendant facing a serious charge may not be deterred by the fear of being prosecuted for perjury, the same cannot be said about other defense witnesses, even those who may be the defendant's friends or relatives.

Finally, respondent's *amicus* contends that the harm to the truth-seeking process is even greater when the testimony of a defense witness cannot be challenged than when the defendant's own testimony is at issue, because "the natural skepticism that accompanies testimony from a defendant is not present, or not as strong, in the case of testimony from other witnesses." (Brief for the United States 17) However, as *amicus* acknowledges, if one proceeds on the assumption that the defendant is engaging in perjury by proxy, it must also be assumed that he could do so only with the aid of a "friendly" witness. In such a case, the witness' relationship to the defendant will give rise to the same natural skepticism which is said to accompany a defendant's own testimony.

In conclusion, while prohibiting the use of tainted evidence for rebuttal purposes may mean in some cases perjury by a defense witness will go unchallenged,

respondent overstates the magnitude of this concern, and in any event this potential cost is heavily outweighed by the harm to the right of all citizens to be secure against illegal seizures that would be caused by the sanctioning of a rebuttal exception to the exclusionary rule. Petitioner therefore requests that the judgment of the Illinois Supreme Court be reversed.

Respectfully submitted,

MICHAEL J. PELLETIER
Deputy Defender

MARTIN S. CARLSON*
PATRICIA UNSINN
Assistant Appellate Defenders
Office of the State Appellate Defender
State of Illinois Center
100 West Randolph Street
Suite 5-500
Chicago, Illinois 60601
(312) 917-5472

**Counsel of Record*

(7)

No. 88-6075

Supreme Court, U.S.
FILED
JUN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

DARRYL JAMES, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
AMY L. WAX
Assistant to the Solicitor General
JOEL GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

---

26 pp

QUESTION PRESENTED

Whether evidence obtained as a result of an unlawful arrest may be introduced at trial to rebut the testimony of a defense witness.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	5
Argument:	
Evidence obtained in violation of the Fourth Amendment may be used to rebut the testimony of a defense witness	7
A. The exclusionary rule should not be applied where the cost of applying the rule outweighs its effect in deterring unlawful police conduct	7
B. Applying the exclusionary rule to bar the rebuttal of defense witness testimony would impose an unacceptably high cost on the truth-seeking process	12
C. Violations of the Fourth Amendment would not be significantly deterred by excluding improperly obtained evidence from the government's rebuttal case	18
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Alderman v. *United States*, 394 U.S. 165 (1969)	12
Davis v. *Alaska*, 415 U.S. 308 (1974)	13
Doyle v. *Ohio*, 426 U.S. 610 (1976)	13
Elkins v. *United States*, 364 U.S. 206 (1960)	8
Harris v. *New York*, 401 U.S. 222 (1971)	3, 10, 12, 18
Jenkins v. *Anderson*, 447 U.S. 231 (1980)	13
Illinois v. *Krull*, 480 U.S. 340 (1987)	8, 10
Linkletter v. *Walker*, 381 U.S. 618 (1965)	8
Miranda v. *Arizona*, 384 U.S. 436 (1966)	10, 11
Nix v. *Williams*, 467 U.S. 431 (1984)	13
Olden v. *Kentucky*, 109 S. Ct. 480 (1988)	13
Oregon v. *Hass*, 420 U.S. 714 (1975)	3-4, 11, 18
Raffel v. *United States*, 271 U.S. 494 (1926)	13
Stone v. *Powell*, 428 U.S. 465 (1976)	7, 8, 9

Cases—Continued: Page

Tennessee v. *Street*, 471 U.S. 409 (1985) 13
United States v. *Calandra*, 414 U.S. 338 (1974) 5, 7, 8-9
United States v. *Ceccolini*, 435 U.S. 268 (1978) 9
United States v. *Havens*, 446 U.S. 620 (1980) 4, 11, 12, 18, 21
United States v. *Janis*, 428 U.S. 433 (1976) 9
United States v. *Leon*, 468 U.S. 897 (1984) 7, 8, 9
United States v. *Mandujano*, 425 U.S. 564 (1976) 12
United States v. *Peltier*, 422 U.S. 531 (1975) 8, 10
United States v. *Robinson*, 108 S. Ct. 864 (1988) 13
Walder v. *United States*, 347 U.S. 62 (1954) 3, 10, 21

Constitution:

U.S. Const.:
Amend. IV 1, 3, 5, 7, 9, 17, 18, 21-22
Amend. V 13

Miscellaneous:

3A J. Wigmore, *Evidence* (Chadbourne rev. 1970) 14
E. Cleary, *McCormick on Evidence* (2d ed. 1972) 14

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-6075

DARRYL JAMES, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether illegally seized evidence may be introduced at trial to rebut the testimony of a defense witness. That issue is important to the conduct of criminal trials, as is the more general question raised by this case concerning the proper scope of the Fourth Amendment exclusionary rule. Because the issue presented here can arise in federal as well as state prosecutions, the United States has a law enforcement interest in the outcome of this case.

STATEMENT

1. At approximately 11 p.m. on August 30, 1982, three men approached a group of eight youths who were returning home from a party in Chicago. The men de-

manded money. When no money was surrendered, one of the three men produced a gun and began shooting into the larger group. One member of the group was killed and another injured as a result of the gunfire. The next evening, the police arrested petitioner in connection with the shootings. They found him at his mother's beauty shop sitting under a hair dryer. J.A. 17-18, 24-25.

Soon after his arrest, petitioner told the police that, on the evening of August 30, his hair was long, reddish in color, and combed straight back. He said that on August 31 he had gone to his mother's beauty parlor to have his hair dyed and curled in order to change his appearance. J.A. 10-11, 19, 26.

Petitioner was subsequently indicted for murder and attempted murder. Prior to trial, he moved to exclude his post-arrest statement on the ground that it was the fruit of an arrest made without probable cause. The trial court granted the motion. J.A. 19, 26.

At petitioner's trial, five eyewitnesses identified petitioner as the shooter. They further testified that the shooter had shoulder-length "reddish" hair that was worn in a slicked-back "butter" style, and that he wore an earring in his left ear. Each of the witnesses recalled having seen petitioner a few weeks before the shooting wearing his hair in a red "butter" style and wearing an earring in his left ear. At trial, petitioner's hair was black and he was wearing it in a "natural" style. J.A. 18, 26.

Petitioner did not testify in his own behalf, but he called two defense witnesses. Jewel Henderson, a friend of petitioner's, testified that on the day of the shooting petitioner's hair was black. J.A. 2-6. The State then sought to introduce petitioner's previously suppressed statement, in which he had admitted that his hair was red and straight on the day of the shooting, and that he had changed his hair style the next day to alter his appearance. After determining that the statement was voluntary, the trial court permitted the arresting officer to relate it to the jury. J.A. 9-11, 19, 26.

Following that testimony, the trial court instructed the jury (J.A. 12) that the testimony was

> offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red.

At the close of the evidence, the trial court refused to instruct the jury that petitioner's statement should be considered solely to determine Henderson's credibility and not as substantive evidence of petitioner's guilt. J.A. 13, 19, 27. During closing argument, the prosecutor reminded the jury of petitioner's "admission that he changed * * * the color of his hair." J.A. 14, 19, 27.

Petitioner was convicted on both charges. He was sentenced to concurrent terms of 30 years' imprisonment for the murder and 15 years' imprisonment for the attempted murder.

2. On appeal, the Illinois Appellate Court held that the use of the tainted statements to rebut Henderson's testimony violated petitioner's Fourth Amendment rights, and that the error was not harmless. The court therefore reversed petitioner's convictions and ordered a new trial. J.A. 17-23. The Illinois Supreme Court thereafter granted the State's petition for review and affirmed the convictions. J.A. 24-53.

The Illinois Supreme Court relied on the so-called "impeachment exception" to the exclusionary rule, as developed in *Walder* v. *United States*, 347 U.S. 62 (1954); *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420

U.S. 714 (1975); and *United States* v. *Havens*, 446 U.S. 620 (1980). The court observed that those cases "exhibit strong disapproval" of attempts to "transform [the exclusionary rule] into a shield for knowing perjury or intentional misrepresentation." J.A. 35. The court then held that "when a defense witness testifies on direct examination in a manner squarely at odds with evidence which has been suppressed, that evidence may be introduced to challenge the veracity of the testimony." J.A. 37-38.

The court rejected petitioner's contention that the exception to the exclusionary rule recognized in *Walder* and its progeny applies only when the defendant elects to testify. J.A. 35-36. Rather, the court found that the *Walder* line of cases turns on "a balancing between the goals of the exclusionary rule and the importance of arriving at the truth in criminal trials." J.A. 35. In balancing those factors, the court concluded that just as the exclusionary rule does not permit the defendant to perjure himself with impunity, it also should not be applied to bar the government from challenging the veracity of "perjurious testimony" offered through a defense witness. J.A. 36. The court observed that its holding would not erode the protections of the exclusionary rule. Instead, the court explained that "[i]f this exception to the exclusionary rule is limited to the use of the suppressed evidence to rebut statements made by a defense witness on direct examination, there is little likelihood that the police would plan to disregard constitutional rights to obtain a statement from the defendant on the slight chance that a witness for the defense would commit perjury on direct examination." *Ibid.*

Three justices dissented. In their view, the "impeachment exception" to the exclusionary rule is limited to cases involving testimony by the defendant himself. This case is not governed by the impeachment exception, the dissenting justices concluded, because petitioner's illegally obtained statement was used not to impeach the defendant himself, but to rebut the testimony of a defense witness. J.A. 41-53.

SUMMARY OF ARGUMENT

A. The Fourth Amendment exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). In deciding whether the exclusionary sanction is appropriate in a particular context, the Court has applied a pragmatic balancing test: the Court weighs the marginal deterrent effect of excluding evidence in that context against the detrimental effect of the exclusion of evidence on the effectiveness of the criminal process in accurately determining guilt or innocence.

The core function of the adversary process is to uncover the truth. In our system of justice, that function is carried out by providing each party with the tools to challenge the veracity and persuasiveness of the evidence offered by the other. The case against application of the exclusionary rule is at its strongest when the rule interferes with the proper functioning of the adversary system by depriving one party of the means to undermine false testimony (or to correct a false picture of the facts) adduced by the opposing party.

This analysis has been the basis for a series of decisions in which this Court has permitted the use of illegally obtained evidence to impeach a defendant's testimony at trial. The Court has recognized that testing a witness's credibility through the device of impeachment is critical to the jury's ability to arrive at the truth, and that depriving the fact-finder of that evidence would work a grave cost to the truth-seeking function.

B. The same analysis applies in this case. The prosecutor's opportunity to rebut assertions by a defense witness is just as important to the integrity of the trial process as the prosecutor's ability to impeach a defendant who takes the stand in his own defense. The danger that the jury will be misled if false testimony goes unchallenged is too great to justify exclusion of competent evidence that serves to rebut testimony offered on behalf of the defense.

To distinguish between the use of tainted evidence for impeachment, on the one hand, and for rebuttal, on the other, would invite defendants to structure their defenses to avoid having to confront damaging evidence. If petitioner's proposed rule is adopted, defendants could avoid powerful contradicting evidence by the simple expedient of having a defense witness set forth the defense case, rather than having the defendant do so. The truth-seeking function of the adversary process should not have to suffer such readily avoidable abuse. Nor should a rational system of justice provide temptations to engage in such abuse.

C. The exclusionary rule, a product entirely of judicial craftsmanship and not of constitutional imperative, finds its sole justification in the presumed deterrent effect upon police misconduct. But the deterrent effect that might be expected from applying the exclusionary rule in this setting is no greater than the deterrent effect of the rule in the impeachment context. Whether the issue is the impeachment of testimony by the defendant or the rebuttal of testimony by defense witnesses, the incremental deterrent effect of the exclusion of evidence is likely to be minimal. Under this Court's teachings, any deterrence of police misconduct resulting from the exclusionary rule is likely to flow from excluding the illegally seized evidence from the government's case in chief. While an officer engaged in a search may reasonably be presumed to contemplate that

the fruits of his search will result in a prosecution and trial, the prospect and potential content of impeachment and rebuttal are much more speculative. It is therefore implausible to assume that police officers who are undeterred from unlawful conduct by the prospect of the suppression of evidence from the government's case in chief would be persuaded to refrain from that conduct by the prospect that the government will not be able to use the fruits of their unlawful conduct on rebuttal. Even if suppressing illegally seized evidence from use on rebuttal is thought to have some slight deterrent effect, the powerful societal interest in accurate factfinding heavily outweighs that effect and calls for the admission of the evidence.

ARGUMENT

EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT MAY BE USED TO REBUT THE TESTIMONY OF A DEFENSE WITNESS

A. The Exclusionary Rule Should Not Be Applied Where The Cost Of Applying The Rule Outweighs Its Effect In Deterring Unlawful Police Conduct

1. The Fourth Amendment forbids unreasonable searches and seizures, not the use of the fruits of illegal searches in criminal proceedings. As this Court has often observed, the harm suffered as a result of a violation of the Amendment is "fully accomplished" by the unlawful search or seizure itself. The exclusion of illegally seized evidence provides no cure for the constitutional harm. *United States* v. *Calandra*, 414 U.S. 338, 354 (1974); see *United States* v. *Leon*, 468 U.S. 897, 906 (1984); *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). In erecting the exclusionary rule as a "means of effectuating the rights secured by the Fourth Amendment," *Stone* v. *Powell*, 428 U.S. at

482, the Court has recognized that the exclusion of illegally seized evidence is necessarily designed

> to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

Elkins v. *United States*, 364 U.S. 206, 217 (1960); see *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965); *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975).

As with any remedial device, "application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively served." *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987). Because the purpose of the exclusionary rule is to deter unlawful police conduct, not to compensate victims of such misconduct, and because the exclusion of competent evidence exacts a high cost in the truth-seeking process, this Court has emphasized time and again that the exclusion of tainted evidence in a particular class of cases must be justified by the added deterrent effect of extending the rule to that class of cases. See *United States* v. *Leon*, 468 U.S. at 906-913. For that reason, the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone* v. *Powell*, 428 U.S. at 486.

The Court has declined to apply the exclusionary rule in a variety of contexts. In each such instance, the Court has concluded that the cost to society that results from withholding trustworthy evidence outweighs the deterrent effect of excluding the evidence. For example, in *United States* v. *Calandra*, *supra*, the Court refused to bar the government from questioning a grand jury witness on the basis of information obtained in an illegal search. The Court observed that such an "extension of the exclusionary rule would seriously impede the grand jury," while the "incremental deterrent effect" of excluding evidence in

the grand jury context would be "uncertain at best." 414 U.S. at 349, 351.

The Court employed a similar analysis in *Stone* v. *Powell*, *supra*, where it declined to grant federal habeas corpus relief based on the introduction of tainted evidence at a state court trial. The Court observed that the risk that a conviction "might be overturned in collateral proceedings" as a result of the introduction of illegally obtained evidence would not add to the "disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review." 428 U.S. at 493. The Court considered the societal costs of applying the exclusionary rule in that context too substantial to justify the "minimal" contribution to the effectuation of the Fourth Amendment. 428 U.S. at 494-495.

Finally, in *United States* v. *Leon*, *supra*, the Court refused to apply the exclusionary rule to evidence seized by police officers who acted in good faith in obtaining a warrant, where the warrant was later held not to be supported by probable cause. Once again applying its balancing approach, the Court decided that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." 468 U.S. at 922.[1]

---

[1] In *United States* v. *Ceccolini*, 435 U.S. 268, 277, 280 (1978), the Court upheld the admission of the testimony of a witness who, as the result of an illegal search, was identified as possessing relevant information. The Court recognized that in that context the effect of exclusion on the future conduct of the police would be "slight," and would come at the high cost of disqualifying a knowledgeable and willing witness. Likewise, in *United States* v. *Janis*, 428 U.S. 433, 453-454 (1976), the Court declined to preclude the use of tainted evidence in a civil tax proceeding, where that evidence had already been excluded from a state criminal prosecution, because the additional deterrent

2. Weighing the costs of the exclusionary rule against its benefits, the Court has on several occasions held that illegally obtained evidence may be used at trial to impeach a defendant's false testimony. In *Walder* v. *United States*, 347 U.S. 62 (1954), the Court upheld the government's use of suppressed evidence—in that case, a heroin capsule illegally seized two years prior to trial—to impeach the defendant's statement, at his trial for an unrelated drug violation, that he had never possessed narcotics.

Subsequently, in *Harris* v. *New York*, 401 U.S. 222 (1971), the Court permitted the State to impeach a defendant's testimony by confronting him on cross-examination with inconsistent statements he had made while in custody. Although the inconsistent statements were taken in violation of the rule in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court held that the balance of interests justified the use of the statements for impeachment purposes. The Court explained (401 U.S. at 225):

> The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby.

The Court added that "assuming that the exclusionary rule has a deterrent effect on proscribed police conduct," ade-

---

effect of exclusion would "not outweigh the cost to society of extending the rule to that situation." The judgment that exclusion would not have an appreciable deterrent effect also underlay the Court's decision to permit the introduction of evidence obtained through searches conducted in reliance on a statute that was subsequently held to be unconstitutional. *Illinois* v. *Krull*, *supra*. See also *United States* v. *Peltier*, 422 U.S. 531, 538-539 (1975) (deterrence rationale of exclusionary rule not furthered by retroactive application of new constitutional doctrines).

quate deterrence of violations of the prophylactic rule adopted in *Miranda* is effected by barring the affirmative use of improperly obtained evidence in the prosecution's case in chief. *Ibid.*

The Court applied a similar balancing test in *Oregon* v. *Hass*, 420 U.S. 714 (1975). There, the defendant was arrested on suspicion of bicycle theft. He made certain admissions regarding the thefts before he was allowed to contact his attorney. Those admissions were suppressed under *Miranda*. After the defendant made contradictory assertions at trial, however, the trial court permitted the State to offer the suppressed statements for impeachment purposes.

In upholding the use of the evidence, the Court reiterated the statement in *Harris* that it " 'does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.' " 420 U.S. at 721 (quoting 401 U.S. at 224). In the Court's view, the policies underlying the exclusionary rule did not compel the Court to let the defendant's perjury go unchallenged, because "there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief." 420 U.S. at 722.

Similarly, in *United States* v. *Havens*, 446 U.S. 620 (1980), the Court permitted the introduction of illegally seized physical evidence to impeach the defendant's denial on cross-examination that he had possessed any incriminating material in connection with a cocaine smuggling scheme. The Court observed (446 U.S. at 627) that "the policies of the exclusionary rule no more bar impeachment here than they did in *Walder*, *Harris*, and *Hass*." In those cases, the Court observed, "[t]he incremental furthering of [the policy of deterrence] by forbidding impeachment of

the defendant who testified was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the fact-finding goals of the criminal trial." *Ibid.*

B. Applying The Exclusionary Rule To Bar The Rebuttal Of Defense Witness Testimony Would Impose An Unacceptably High Cost On The Truth-Seeking Process

In the cases recognizing an "impeachment exception" to the exclusionary rule, the Court has stated that to exclude evidence in this context would exact an especially high price by distorting the truth-seeking process at trial. Preventing the use of evidence for impeachment, the Court has noted, poses a far greater risk of converting a constitutional protection into a "license to use perjury by way of a defense," *Havens*, 446 U.S. at 626, than preventing the use of the same evidence in the prosecution's case in chief. The same analysis, we believe, applies to the application of the exclusionary rule to evidence the government seeks to use to rebut the testimony of defense witnesses.

1. The public has a compelling interest in "prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). To preserve the integrity of the judicial process and achieve the "fundamental goal of our legal system," *Havens*, 446 U.S. at 626, it is critical that witnesses tell the truth. See *Harris*, 401 U.S. at 225; *Hass*, 420 U.S. at 723. So strong is the policy against false testimony that this Court has permitted prosecution for perjury even where the government "exceeded its constitutional powers in making the inquiry." *United States* v. *Mandujano*, 425 U.S. 564, 577 (1976) (plurality opinion); *id.* at 576 ("Perjured testimony is an obvious and flagrant affront to the

basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative.").

The adversarial truth-seeking process is most vulnerable when one party is forbidden to present evidence that could undermine false or misleading testimony introduced by the other party. See *Olden* v. *Kentucky*, 109 S. Ct. 480 (1988); *Davis* v. *Alaska*, 415 U.S. 308 (1974). When such evidence is excluded, the "enormous societal cost of excluding truth," *Nix* v. *Williams*, 467 U.S. 431, 445 (1984), is augmented by the danger that the jury will be permitted to believe what is false. In recognition of that danger, the Court in a variety of settings has accorded prosecutors greater leeway in impeachment and rebuttal than in their case in chief.[2] The Court's rulings in each instance reflect the recognition that the jury's ability to reach the correct result in a case is imperiled more by permitting false testimony to go uncorrected than by withholding reliable evidence in the first instance.

---

[2] See, *e.g.*, *Raffel* v. *United States*, 271 U.S. 494 (1926) (although a prosecutor ordinarily may not comment upon a defendant's failure to testify, the prosecutor in a second trial in which the defendant takes the stand may cross-examine the defendant as to his failure to testify in the first trial); *Doyle* v. *Ohio*, 426 U.S. 610, 619-620 n.11 (1976) (government may impeach a defendant with his failure to tell his exculpatory story after receiving *Miranda* warnings if the defendant testifies that he did tell that story to the police following arrest); *Jenkins* v. *Anderson*, 447 U.S. 231 (1980) (government may impeach a testifying defendant with his failure to tell his exculpatory story prior to his arrest); *Tennessee* v. *Street*, 471 U.S. 409 (1985) (government may offer into evidence a co-defendant's confession to correct the defendant's misleading testimony that his own confession was a coerced imitation of his co-defendant's); *United States* v. *Robinson*, 108 S. Ct. 864 (1988) (prosecutor's comment on defendant's failure to testify, offered to rebut defense counsel's suggestion that the government had prevented him from testifying, did not violate the Fifth Amendment).

2. a. The Court's concern that unrepudiated testimony will distort the fact-finding process informed its decisions in *Walder, Havens, Harris,* and *Hass.* That potential is equally present when it is a defense witness who testifies, rather than the defendant himself, and when the evidence that is offered to correct a misleading impression serves to rebut the witness's misrepresentations rather than simply to impeach his credibility.

The introduction of evidence to rebut a witness's testimony is a long-recognized method for guarding against perjury and probing the reliability of the witness's statements. See E. Cleary, *McCormick on Evidence* §§ 33, 47, at 66, 97-99 (2d ed. 1972); 3A J. Wigmore, *Evidence* § 1000 (Chadbourne rev. 1970). The use of such evidence to contradict a defense witness serves the dual purpose of "relevant proof and of reflecting on the credibility of contrary witnesses." E. Cleary, *supra,* at 99.[3]

[3] A witness's own inconsistent statements and statements by others that contradict the witness's assertions both serve to undermine a witness's credibility by casting doubt on the truth of the witness's testimony and suggesting that the witness has "made some sort of mistake." 3A J. Wigmore, *supra,* § 1017, at 994. Although it is possible to discredit, or "impeach," a witness with his own self-contradictory statements without considering the impeaching statement for its substance, it is not possible to "impeach" by extraneous contradictory evidence without permitting that evidence to be accepted for the truth of what it declares. When a witness's own prior inconsistent statements are introduced to discredit him, "[t]he capacity to err invariably appears, from the very fact of self-contradiction." *Id.* at 995. The jury can conclude that the witness is untrustworthy without considering which, if any, of the inconsistent statements is true. By contrast, when a witness is contradicted by the statement of another, "[the capacity to err] does not appear unless we believe the opposing witnesses' assertions." *Ibid.* The contradiction generated by the disparity in the evidence makes the discredited witness appear less believable, but only by convincing the jury that what the witness has stated is untrue. Extraneous contradictory evidence offered for rebuttal therefore *must* function as a direct refutation of the witness's testimony, because its effectiveness as rebuttal requires that the jury evaluate and consider the testimony as proof of the matter asserted.

Like the exclusion of evidence that impeaches a defendant, the exclusion of evidence that refutes a misleading line of testimony by a defense witness is far more damaging to the truth-seeking process than the preclusion of the government's affirmative use of such material in its case in chief. Barring the government from using suppressed material in its case in chief deprives the jury of certain evidence that might serve to strengthen the government's case. Even if some probative evidence is withheld, however, the prosecutor may succeed in proving the same facts by other means. Through the testimony of additional witnesses or the presentation of other available evidence, the jury may thus be given an accurate, if incomplete, picture of the case. But when a defense witness presents testimony that creates a false impression of the facts, and the jury's misapprehension cannot be corrected because a pretrial suppression order shields the witness from contradiction, the truth-seeking process may be seriously distorted. An incomplete picture is ordinarily far less misleading than one that contains affirmative inaccuracies.

It is clear in this case, as the trial judge advised the jury (J.A. 12), that the defendant's suppressed statements were introduced to rebut Henderson's testimony and therefore had to be considered by the jury for their truth. While evidence of that sort is sometimes referred to as a form of impeachment, we believe it is more accurate to refer to it as rebuttal, since the evidence has its effect of undermining the defense testimony only to the extent that the jury believes it to be true. For that reason, we believe the Illinois Supreme Court erred in suggesting that the trial court should have instructed the jury that the suppressed statement could be used only for impeachment and not "as evidence of the commission of any of the crimes charged." J.A. 39. Such an instruction would be confusing, it would not be required by any rule of evidence, and for the reasons we discuss in the text, it would not be required by exclusionary rule policy.

In this case, were it not for the admission of petitioner's statements to the police the day after the shootings, the jury might have reached an erroneous conclusion about the murderer's identity. By calling Jewel Henderson to testify that petitioner's hair was black on the day of the shootings, petitioner sought to convince the jury that the eyewitness identifications were mistaken. If petitioner's post-arrest statement had not been admitted, the jury would have been deprived of the most compelling reason to doubt the accuracy of Henderson's testimony and therefore might have found her testimony sufficient to raise a reasonable doubt as to whether petitioner was the culprit.

b. This case demonstrates that there is no important difference between permitting tainted evidence to be used to impeach a testifying defendant and permitting such evidence to be used to contradict a defense witness's testimony. Petitioner could have testified at trial and claimed that his hair was black on the day of the shooting. Instead, he chose to present the same claim to the jury by calling Henderson to give that testimony. Of course, if petitioner had testified about his hair color, the State could have impeached him with his prior admissions. There is no reason to adopt a different rule when petitioner has simply used a different witness to offer the same story.

Allowing a defendant to put on a witness to testify inconsistently with the defendant's voluntary statements to the police grants a license to engage in perjury by proxy. If a witness testifying on the defendant's behalf is shielded from effective challenge by the exclusion of the defendant's prior inconsistent statements, the defendant can do indirectly what he cannot do directly; he can mislead the jury by mounting a false defense free from contradiction by competent evidence that he knows to be in the possession of the authorities. The potential for mischief in allowing a defense witness to go unchallenged is even greater

than in allowing the defendant himself to testify without fear of contradiction; the reason is that the natural skepticism that accompanies testimony from a defendant is not present, or not as strong, in the case of testimony from other witnesses. Thus, permitting a witness other than the defendant to present the defendant's story without fear of contradiction by the defendant's own inconsistent admissions could lead to grave distortions of the truth-seeking process in any case in which a friendly witness is willing to testify in a manner inconsistent with the defendant's own admissions or other reliable evidence that has been suppressed on Fourth Amendment grounds.

Even if the difference between impeachment and rebuttal might be significant in other settings, it is of particularly little moment here. If the defendant chooses to offer his theory of defense through his own testimony, and he is impeached by his own inconsistent statements to the police, the effect of the impeachment is to discredit his theory of defense in the eyes of the jurors. If the defendant chooses to offer his theory of defense through a defense witness, and the defense witness's testimony is rebutted by the defendant's inconsistent statements to the police, the effect is the same. Because rebuttal serves a role in the adversary process that is parallel to and at least as important as impeachment, the two should stand or fall together.

This Court's decisions do not justify drawing a distinction, for exclusionary rule purposes, between evidence offered for impeachment and evidence offered in rebuttal. Contrary to petitioner's assertion, there is nothing in the "impeachment exception" cases that would bar the government from using tainted evidence for rebuttal. While the Court in each of the "impeachment exception" cases noted that the jury was instructed that it could use the evidence in question only for impeachment purposes, the Court did not rely on that restriction as a basis for admitting the

evidence. Rather, the Court found the policies of the exclusionary rule sufficiently served as long as the government was barred from using the suppressed evidence in its case in chief. *Harris*, 401 U.S. at 225; *Hass*, 420 U.S. at 722; see also *Havens*, 446 U.S. at 627. Permitting tainted evidence to be used for rebuttal purposes is therefore not at odds with the decisions of this Court.

C. Violations Of The Fourth Amendment Would Not Be Significantly Deterred By Excluding Improperly Obtained Evidence From The Government's Rebuttal Case

The remaining question is whether applying the exclusionary rule to prevent the government from correcting a misleading impression created by a defense witness will provide sufficient additional deterrence of police misconduct to outweigh the harm of allowing the testimony to go unchallenged. We think not. Permitting the introduction of suppressed evidence to undermine a defense witness's testimony is unlikely to encourage the police to detain and question defendants without probable cause or otherwise to seize evidence illegally. The exclusionary rule already requires suppression for the most important prosecutorial needs. Suppression in the circumstances presented here would not provide sufficient additional deterrence to outweigh the substantial societal costs of exclusion.

As this Court has recognized, the expectation that any evidence obtained in violation of the Fourth Amendment will be excluded from the prosecution's case in chief provides the principal disincentive to unlawful police action. In many cases, a suppression order destroys the prosecution's case at the outset, because the prosecutor is left with insufficient evidence to withstand a motion for a judgment of acquittal at the close of the government's case. But even if the case does go to trial, the exclusion of

the evidence for rebuttal purposes would result in very little additional disincentive to improper action by the authorities, because the opportunity to use illegally obtained evidence for this purpose arises only in limited circumstances.

By definition, illegally seized evidence can be used in rebuttal only if there are defense witnesses to rebut. Defendants, however, frequently choose to put the government to its proof and not to mount a defense. In addition, because illegally seized evidence is already admissible to impeach the defendant, the "rebuttal exception" to the exclusionary rule will affect only those cases in which the defendant puts on a defense but does not testify on his own behalf. Finally, even if the defendant does put on a defense, the rebuttal exception will come into play only if the defense witnesses offer testimony that is at odds with suppressed evidence the defendant knows to be in the government's possession. The defendant can avoid the admission of the tainted evidence if his witnesses avoid testifying in a manner that is inconsistent with the suppressed evidence in question.[4]

The rebuttal exception will therefore be inapplicable in many cases, and the defendant will in any event maintain control over the admission of the tainted evidence, either by not testifying, by not putting on a case, or by shaping the defense case in a way that is not inconsistent with the

---

[4] That appears to have been true in part in this case. In addition to the admissions about his hair color, petitioner made admissions to the police about the shootings. The State sought to introduce those admissions at trial on the ground that Henderson's testimony in effect presented an alibi defense that was inconsistent with petitioner's statements regarding the crime. The trial court, however, concluded that Henderson's testimony was not contrary to petitioner's admissions about the shootings and therefore did not permit the State to introduce those admissions in rebuttal. Pet. Br. 2, 4.

tainted evidence. Those factors significantly diminish the marginal deterrent effect of applying the exclusionary rule to rebuttal evidence.

The only possible justification for a rule that would permit the use of tainted evidence for impeachment but not for rebuttal would be that such a rule would bar the use of suppressed evidence in a particular class of cases, and to that extent arguably would enhance the deterrent effect of the exclusionary rule. But the same increased deterrent effect could be achieved, with the same support in logic, by refusing to permit the use of suppressed evidence under any circumstances in all odd-numbered cases. Simply reducing the number of instances in which illegally seized evidence will be used at trial is not a rational way to develop exclusionary rule policy.[5] What matters in each set-

[5] The Illinois Supreme Court apparently sought to ensure that tainted evidence would not often be used for rebuttal by setting forth several conditions limiting the circumstances under which a defense witness's testimony could trigger the introduction of suppressed evidence. First, the court held that a defendant's suppressed statements could be admitted only to rebut defense witness statements made on direct examination, and only if there was a "direct, material relationship between the trial testimony and the impeaching evidence." J.A. 38. In addition, the court stated that "it must be apparent that the untrue statement of the witness, as so measured, has been purposely presented by the defendant." J.A. 37. Finally, the court barred the use on rebuttal of "any part of a suppressed statement of the defendant which can be characterized as a confession." *Ibid.*

In our view, the conditions the court placed on the introduction of suppressed evidence to rebut a defense witness are neither constitutionally required nor otherwise justified under the balancing test adopted by this Court in applying the exclusionary rule. First, there is no reason to limit the exception to the rebuttal of evidence offered on direct examination. The potential of false testimony to pervert the truth-seeking process does not depend on whether the false answers are given on direct or cross-examination. As long as the cross-examination is properly within the scope of the witness's direct exami-

ting is the importance of the evidence to the truth-finding process, as weighed against the effect that exclusion might have on the willingness of police officers to honor Fourth

nation, any exception to the exclusionary rule that applies to direct examination should also apply to cross-examination, as this Court held in *Havens*, 446 U.S. at 626-627.

Likewise, there is no basis for requiring that the suppressed testimony squarely refute the testimony of a defense witness or that it be apparent that the defense testimony at issue was purposely elicited by the defendant. Evidence that presents a "mere inconsistency" may sometimes prove critical in correcting a false impression created by a witness's testimony on a matter central to the case. And, apart from the difficulty of determining whether particular testimony elicited from a defense witness was "purposely presented" by the defendant, false testimony can be misleading even if it was volunteered by the witness rather than having been planned and promoted as part of the defense strategy.

Finally, there is no reason to prohibit the use of a suppressed confession as distinguished from an admission that does not amount to a confession. In setting forth this limitation, the court relied on a statement in *Walder* that the defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it." 347 U.S. at 65. See J.A. 37. In construing this statement, the Illinois Supreme Court got it backwards: the statement in *Walder* addressed the introduction of tainted evidence to impeach the defendant's in-court denial of the elements of the offense; it was not directed at the content of the defendant's out-of-court statement. The *Walder* statement thus has no application here, since petitioner did not testify; the introduction of the illegally seized evidence was therefore not triggered by any exculpatory testimony by petitioner. In any case, this Court's decision in *Harris* makes clear that there is no categorical proscription against the introduction of a suppressed confession. With respect to the impeachment of a defendant by his out-of-court statements, the Court in that case declined to carve out an exception for statements that amount to an admission of guilt. Finally, distinguishing between a damaging admission and a confession would be a fruitless endeavor; there is no sharp dividing line between the two and no policy reason to try to draw one.

Amendment safeguards. Because in the rebuttal context, as in the impeachment context, the need for the evidence is great and the marginal deterrent effect of exclusion is minimal, illegally seized evidence should be admissible when it is offered for purposes of rebuttal.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
AMY L. WAX
Assistant to the Solicitor General
JOEL GERSHOWITZ
Attorney

JUNE 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00319